

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Gila Valley Irrigation District, et al.,

Defendants.

No. CV 31-0061-TUC-SRB  
Freeport-McMoRan Applications

**ORDER**

At issue are ten Applications to Sever and Transfer Decree Water Rights filed by Freeport-McMoRan Corporation ("Freeport"), namely Applications 2008-115, -118, -122, -133, -138, -147, -150, -151, -162 and -166.<sup>1</sup> After a bench trial on February 9-25, 2010, the Court now sets forth its Findings of Fact and Conclusions of Law.

Also at issue is the Oral Motion for Judgment as a Matter of Law made by the San Carlos Apache Tribe (the "Tribe") (Doc. 110).

**I. BACKGROUND**

Freeport's Applications involve water rights arising under the Globe Equity No. 59 Decree ("Decree"), a consent decree adopted by this Court on June 29, 1935, that quantified the rights to use the natural flow of the mainstream of the Gila River on

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<sup>1</sup> Because all of these Applications were filed in 2008, the Court refers to them only by their last three digits (e.g., "Application 115") for purposes of this Order.

1 specific lands. (*See* Case No. CV 31-0059-TUC-SRB.)<sup>2</sup> The Court has continuing  
 2 jurisdiction over the interpretation, administration and enforcement of the Decree.  
 3 (Decree, Art. XIII at 113; *see also* Case No. CV 31-0059-TUC-SRB, Doc. 1454, May 2,  
 4 1983, Order at 2, 22.)

5 The Decree states

6 that any of the parties to whom rights to water have been decreed herein shall  
 7 be entitled, in accord with applicable laws and legal principles, to change the  
 8 point of diversion and the places, means, manner or purpose of the use of the  
 9 waters to which they are so entitled or of any part thereof, so far as they may  
 10 do so without injury to the rights of other parties as the same are defined  
 11 herein.

12 (Decree, Art. XI at 112.) In 1993, the Court issued an Order commonly referred to as the  
 13 Change in Use Rule that describes the requirements for the severance and transfer of a  
 14 Decree water right. (Case No. CV 31-0059-TUC-SRB, Doc. 3838, Sept. 30, 1993, Mem.  
 15 & Order, § IV, Changes in Points of Diversion & Places, Means, Manner or Purpose of  
 16 the Use of the Waters of the Gila River.) Pursuant to this Rule, the Gila Water  
 17 Commissioner (“Commissioner”) created an Application Form to be used by parties  
 18 desiring to change the point of diversion or place, means, manner or purpose of use of a  
 19 Decree water right. The Change in Use Rule provides that, once the Commissioner gives  
 20 notice that an application has been filed, any party holding a Decree water right may file  
 21 an objection to the application. (*Id.*, § IV(3).) In a subsequent evidentiary hearing, the  
 22 applicant has “the burden of establishing a prima facie case of no injury to the rights of  
 23 other parties under the Gila Decree and a right to transfer,” and, upon that showing, the  
 24 objecting party has the burden “to demonstrate that injury will result from the proposed  
 25 change or that the applicant has no right to the proposed transfer.” (*Id.*, § IV(4).)

26 In 2006, Freeport and other Defendants with Decree water rights in the Upper  
 27 Valley of the Gila River (collectively, “UV Defendants”) entered into a water rights  
 28 Settlement Agreement with the Gila River Indian Community (the “Community”), the

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<sup>2</sup> To more effectively administer Freeport’s Applications, the Court assigned new Docket No.  
 CV 31-0061-TUC-SRB, which is a subpart of lead case CV 31-0059-TUC-SRB.

1 United States in its capacity as trustee for the Community, and numerous other parties.  
 2 (*See* Case No. CV 31-0059-TUC-SRB, Doc. 6458, Stipulation of J.; Doc. 6459-1, Am. &  
 3 Restated Gila River Indian Cmty. Water Rights Settlement Agreement.) This agreement  
 4 was ratified and approved by Congress in the Arizona Water Settlements Act of 2004,  
 5 P.L. 108-451. As part of the Settlement Agreement and in an effort to resolve numerous  
 6 issues surrounding the use of wells for pumping water in the Upper Valley of the Gila  
 7 River, the UV Defendants entered into what became known as the UV Forbearance  
 8 Agreement with the Community, the United States and the San Carlos Irrigation and  
 9 Drainage District (“SCIDD”).<sup>3</sup> (Case No. CV 31-0059-TUC-SRB, Doc. 6473-2, Ex.  
 10 26.2 to Settlement Agreement, Am. & Restated Forbearance Agreement (“UV  
 11 Forbearance Agreement”).) The UV Forbearance Agreement provides that, in exchange  
 12 for the dismissal by the Community, the United States and SCIDD of a Pumping  
 13 Complaint before this Court, the UV Defendants will comply with certain terms regarding  
 14 their use of Decree water. The Court approved the UV Forbearance Agreement in an  
 15 Order and Order Pursuant to Stipulation, both dated August 24, 2007, and directed the  
 16 Commissioner to assume additional enforcement duties under the Decree incumbent in  
 17 the UV Forbearance Agreement. (Case No. CV 31-0059-TUC-SRB, Docs. 6595-96.)

18 Section 11.0 of the UV Forbearance Agreement states that the UV Defendants may  
 19 sever existing Decree water rights from their current places of use and transfer them for  
 20 use on a subset of non-Decree lands in the Upper Valley of the Gila River known as Hot  
 21 Lands.<sup>4</sup> (UV Forbearance Agreement at 93.) Section 11.0 provides, in relevant part:

22 11.1 No later than six (6) months after the Enforceability Date, the owners  
 23 of Hot Lands may file an application for severance and transfer of UV  
 24 Decreed Water Rights to the Hot Lands they own. Such application  
 25 shall be in compliance with all the applicable requirements of section  
 IV of the order of the Globe Equity Enforcement Court filed on or  
 about September 30, 1993 [Change in Use Rule]. Such owners shall

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26 <sup>3</sup> The Tribe is a Plaintiff-Intervenor in this case but not a party to the UV Forbearance  
 27 Agreement.

28 <sup>4</sup> A more precise definition of Hot Lands is discussed below.

1 use their best efforts to pursue such application and accomplish such  
2 severance and transfer.

3 11.2 The Community, the San Carlos Irrigation and Drainage District and  
4 the United States shall not object to any application filed by an owner  
5 of Hot Lands in a manner consistent with the terms of Subparagraph  
6 11.1.

7 (*Id.*)

8 In the six months of 2008 following the UV Forbearance Agreement's  
9 Enforceability Date, the Commissioner received 419 Applications to sever and transfer  
10 Decree water rights, including 59 Applications from Freeport.<sup>5</sup> Pursuant to the Change in  
11 Use Rule, Plaintiffs the Community, the Tribe and the United States (collectively, the  
12 "Objecting Parties") then objected to each of the Applications on multiple grounds.<sup>6</sup> (*See*  
13 Change in Use Rule, § IV(3).) Upon receiving the objections, the Commissioner  
14 provided the Court with each Application and the associated objections for resolution.

15 On December 16, 2008, the Court ordered briefing and a conference regarding the  
16 process for reviewing the numerous Applications and associated objections that the Court  
17 had received. (Case No. CV 31-0059-TUC-SRB, Doc. 6930.) After reviewing the  
18 parties' proposals, the Court in its discretion selected to begin deciding Freeport's filed  
19 Applications first, and the Court set a scheduling conference to initiate that process.  
(Case No. CV 31-0059-TUC-SRB, Doc. 7268.) In addition, noting that most of the

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20 <sup>5</sup> In the fifteen years prior to 2008, the Commissioner had received a total of only two  
21 Applications from all Decree water right holders, and neither of those required resolution by  
22 the Court.

23 <sup>6</sup> The Community filed objections to the Applications even though it had agreed not to in the  
24 UV Forbearance Agreement. The Community asserts that the Applications were not filed  
25 by owners of Hot Lands in a manner consistent with the terms of the Change in Use Rule,  
26 as the UV Forbearance Agreement provides, and thus its objections were proper. The Court  
27 addresses this assertion in the Conclusions of Law. The Tribe was not a party to the UV  
28 Forbearance Agreement and thus is not bound by its no-objection provision. The United  
States apparently filed objections on behalf of both the Community and the Tribe. Up until  
the Court stayed any further objections, all three Objecting Parties had objected to each of  
the noticed Applications with only these exceptions: the Community did not timely file  
objections to Applications 2008-16, -106, -108 and -109.

1 objections were redundant from Application to Application and that the Court's  
2 resolution of the issues presented to date would inform future objections, the Court stayed  
3 any further objections to filed Applications and approvals by the Commissioner of new  
4 Applications. (*Id.*) As of May 20, 2009, the date of the Court's stay, the Court had  
5 received 174 processed Applications with associated objections for resolution.

6 With respect to the Freeport Applications, the Court ordered Freeport to designate  
7 no fewer than three and no more than five of its Applications to be presently adjudicated,  
8 and the Court ordered the Objecting Parties collectively to do the same. (Doc. 1,  
9 Scheduling Order.) The parties selected a total of ten Applications for present  
10 adjudication, namely, Applications 115, 118, 122, 133, 138, 147, 150, 151, 162 and 166.  
11 The Court stayed the balance of Freeport's Applications.<sup>7</sup> (*Id.*)

12 In November 2009, during discovery related to the ten Freeport Applications  
13 presently being adjudicated, Freeport provided the Objecting Parties with legal  
14 descriptions of the places of water use before and after the proposed water right transfers  
15 that were different from the legal descriptions Freeport had provided in its ten  
16 Applications. (Doc. 51.) Because the Court had stayed amendments to Applications, the  
17 Objecting Parties asserted that Freeport's revised legal descriptions were improper and  
18 requested a status hearing to discuss how to proceed. (*Id.*) Based on the evidence  
19 provided, the Court could not conclude that Freeport's revisions constituted material  
20 changes to its Applications, and the Court ordered the parties to comply with the  
21 discovery schedule already agreed upon. (*Id.*)

22 On February 9-25, 2010, the Court conducted an evidentiary hearing on the ten  
23 Freeport Applications that included testimony from twelve witnesses. At the close of

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25 <sup>7</sup> Freeport subsequently moved to withdraw seven of the balance of their Applications, and  
26 the Court granted the motion but noted that the counterclaims in the form of objections to  
27 those Applications remain pending for independent adjudication unless dismissed by the  
28 Objecting Parties. (Doc. 25.) Freeport also moved to amend five of the balance of their  
Applications, and the Court stayed this motion pending resolution of the ten Freeport  
Applications presently being adjudicated. (Doc. 26.)

1 Freeport's case-in-chief, the Tribe asserted that Freeport failed to provide any prima facie  
2 evidence of no injury to the rights of other parties under the Decree and moved for  
3 Judgment as a Matter of Law. (Doc. 110.) The Court now makes the following Findings  
4 of Fact and Conclusions of Law regarding Freeport's ten Applications presently being  
5 adjudicated.

6 **II. FINDINGS OF FACT**

7 **A. General Findings**

8 **Maps**

- 9 1. Arizona's 1919 Water Code created the office of the State Water Commissioner.
- 10 2. The 1919 Water Code charged the State Water Commissioner with the task of  
11 making a map with substantial accuracy showing the parcels of cultivated and  
12 irrigated land to which surface water rights were appurtenant.
- 13 3. The State Water Commissioner began making this map in 1920 ("1920 Map"),  
14 relying on survey data and previously made maps of water rights including the  
15 Indian Service's 1913-14 plane table survey map of the Gila River valley.
- 16 4. The 1920 Map indicated the boundary lines of each parcel of land with rights to  
17 Gila River water as well as the land owner's name and the number of acres in each  
18 parcel (to the tenth of an acre).
- 19 5. The 1920 Map indicated parcels of land that were presently being cultivated  
20 (indicated by "C"), previously cultivated (indicated by "PC"), and never cultivated  
21 (indicated by "NC").
- 22 6. The information on the 1920 Map was field verified by the State Water  
23 Commissioner and UV Defendants and was judicially reviewed by Judges Jenckes  
24 and Ling.
- 25 7. Expert witness Allen Gookin testified that the 1920 Map met the accuracy  
26 standards of the day.

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- 1 8. Article XII of the Decree provided for the appointment by the Court of a Gila  
2 Water Commissioner “to carry out and enforce the provisions of this decree, and  
3 the instructions and orders of the Court.” (Decree, Art. XII at 112.)
- 4 9. In 1936, one year after the Decree was entered, the first Gila Water Commissioner,  
5 C. A. Firth, issued the First Annual Report to this Court, in which he said, “It was  
6 essential that maps be made showing the locations of various tracts that were given  
7 rights.”
- 8 10. Mr. Gookin testified that the 1920 Map formed the basis of the Gila Water  
9 Commissioner’s maps of parcels with Decree water rights (“Decree Maps”).
- 10 11. The Decree Maps are found in the Gila Water Commissioner’s office.
- 11 12. Since the Decree was entered in 1935, the Gila Water Commissioners have  
12 updated the Decree Maps to record property right changes to Article V Decree  
13 water rights such as the severance and transfer of one of these water rights from an  
14 existing place of use to a new place of use.
- 15 13. Mr. B.J. Raval from GIS Southwest digitized the Decree maps and georectified<sup>8</sup>  
16 them to the quarter-quarter sections of the Public Lands Survey System.
- 17 14. Mr. Gookin noted that many of the section lines on the original Decree maps were  
18 idealized and thus not entirely accurate.
- 19 15. Mr. Gookin compared the georectified Decree maps to aerial photos to verify the  
20 accuracy of the maps.
- 21 16. Mr. Gookin testified that the georectified Decree maps are an accurate depiction of  
22 the location of Decree lands.
- 23 17. Mr. Gookin testified that the error on the georectified Decree maps is  
24 approximately +/- five feet; *i.e.*, a quarter-quarter section corner on the georectified  
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27 <sup>8</sup> Georectification is the process whereby an image is matched to geographical coordinates  
28 to locate the image geographically on the Earth.



- 1 Decree map could be up to five feet away in any direction from the location of the
- 2 surveyed corner.
- 3 18. The Arizona Department of Water Resources used the georectified Decree maps in
- 4 the preparation of its 1994 report entitled Urbanized and Permanently Retired
- 5 Globe Equity No. 59 Agricultural Lands in the Upper Gila River Valleys.
- 6 19. Mr. Gookin testified that the error in the Bureau of Land Management ("BLM")
- 7 land survey is 1 in 960, or sixteen inches from one quarter-quarter section to the
- 8 next.
- 9 20. Mr. Gookin testified that legal descriptions such as those found in deeds or in
- 10 describing the Sever and Transfer Parcels have no built-in error in giving specific
- 11 locations.
- 12 21. At the request of the Community, Mr. James E. Hardee created a database in the
- 13 ArcGIS software system by compiling the following data and maps:
- 14 a. North American Datum ("NAD") 83 geographical coordinate system projected in
- 15 Universal Transverse Mercator ("UTM") Zone 12
- 16 b. BLM 2007 Township, Range, Section, Quarter, Quarter ("TRSQQ") Map - Public
- 17 Lands Survey System points and lines for townships, ranges, sections and quarter-
- 18 quarter sections in Arizona and New Mexico
- 19 c. Plots of the Sever Parcels and Transfer Parcels described in Exhibit 11 of
- 20 Freeport's Applications<sup>9</sup>
- 21 d. Plots of the Revised Sever Parcels and Revised Transfer Parcels based on
- 22 Freeport's November 2009 revisions to the legal descriptions for its ten
- 23 Applications
- 24 e. The digitized and georectified Decree Maps

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26 <sup>9</sup> The "Sever Parcel" is the existing place of use of the Decree water right, from which the

27 applicant is requesting to sever the Decree water right. The "Transfer Parcel" is the proposed

28 place of use of the Decree water right, to which the applicant is requesting to transfer the

Decree water right.



- 1 f. Gila Water Commissioner Orders of previous transfers of Decree water rights
- 2 g. National Aerial Imaging Project ("NAIP") 2007 imagery - aerial imagery for the
- 3 State of Arizona taken in June 2007 and made available as georeferenced imagery
- 4 by the Arizona State Cartographer
- 5 h. Aerial imagery from the years 1935, 1953, 1978, 1991, 1997-98 and 2004
- 6 i. Arizona County Assessor Parcel Numbers ("APNs")
- 7 j. UV Impact Zone - As shown in Attachment 2.47 of the UV Forbearance
- 8 Agreement and agreed upon by its parties, a geographic area of subflow of the
- 9 Upper Valley of the Gila River as determined by aerial photos of the water-bearing
- 10 strata
- 11 k. Hot Lands - Non-Decree lands in the UV Impact Zone that were irrigated at some
- 12 point between 1997 and 2001
- 13 l. Then Being Irrigated ("TBI") 2007 data - Decree lands that were irrigated in 2007
- 14 m. Gila Valley Irrigation District ("GVID") and Franklin Irrigation District ("FID")
- 15 boundaries
- 16 22. Mr. Hardee testified that the error for the NAIP 2007 aerial imagery is +/- five
- 17 meters, or +/- 16.4 feet.
- 18 23. Mr. Hardee testified that the assessor parcel maps are not very accurate, but they
- 19 do provide adequate information to locate the APN associated with each parcel of
- 20 land.
- 21 24. At the evidentiary hearing, the Community offered to make the database created by
- 22 Mr. Hardee ("Community Database") available to the Gila Water Commissioner
- 23 for his use in enforcing the Decree.

24 **Freeport's Maintenance of Decree Water Rights**

- 25 25. Freeport's resource analysts testified that Freeport purchased the lands, portions of
- 26 which form the Sever Parcels, for the express purpose of obtaining the appurtenant
- 27 Decree water rights.
- 28

- 1 26. Freeport provided un rebutted evidence that it paid the water assessments for its  
2 Decree water rights.
- 3 27. Freeport provided un rebutted evidence that it maintained the ditches and paid the  
4 operational costs for its Decree water rights.
- 5 28. Freeport defended against the Pumping Complaint filed in this Court in 2001.
- 6 29. Freeport was a party to the settlement negotiations with the Community and others  
7 regarding its Decree water rights that resulted in the Arizona Water Settlements  
8 Act, Pub. L. 108-451.
- 9 30. Freeport began preparing the Applications under consideration at least by January  
10 2008.
- 11 31. Freeport filed all ten of the Applications under consideration on June 13, 2008.
- 12 32. In response to the request to “[d]escribe the historical use of the water right for the  
13 last ten (10) years,” (Application Form, Question 14), Freeport replied on all of its  
14 Applications as follows: “To the best of Applicant’s knowledge, use of the water  
15 right (or portion thereof) being transferred under this application to irrigate the  
16 associated farmland is not currently practicable and has not been practicable during  
17 this time frame.”

18 **Freeport’s Proposed Purpose of Use of Water Right After Transfer**

- 19 33. In all ten of its Applications, Freeport stated that the proposed purpose of use of  
20 the Decree water right after transfer is irrigation. (Application Form, Question  
21 21.)

22 **Freeport’s Evidence of No Injury to the Rights of Other Decree Parties**

- 23 34. By the terms of the Decree, the Tribe and the Community have senior priority  
24 water rights to Freeport’s water rights.
- 25 35. In all ten of its Applications, Freeport opined as to whether the proposed severance  
26 and transfer of a water right would affect other Decree water right holders by  
27 stating:  
28

1 All that will be changed as a result of this application will be the location of  
2 decreed rights and associated point of diversion under the Globe Equity No.  
3 59 Decree. The priorities, volumes of water use and acreage will not  
change. There will be no net increase or decrease in decreed rights as a  
result of this proposed severance and transfer.

4 (Application Form, Question 26.)

5 36. In Application 150 under Question 26, Freeport also stated, "A portion of the  
6 water right being severed and transferred will be relocated to a different canal  
7 company within the Gila Valley Irrigation District."

8 37. In its case in chief, Freeport did not provide further evidence of no injury to the  
9 rights of other Decree parties as a result of its proposed water right transfers.

10 38. The Tribe's expert, Mr. Oliver Page, testified that the transfer of a water right from  
11 one place of use and/or point of diversion to another may result in additional  
12 conveyance losses, consumptive use losses and return flow losses as well as a  
13 deterioration of water quality.

14 39. Freeport's expert, Mr. Eric Harmon, testified in rebuttal to the Tribe that a change  
15 in the place of use of a Decree water right could have an impact on other Decree  
16 parties by changing the timing of flows or by decreasing the amount of diverted  
17 water that returns to the river after consumption, or return flow.

18 40. Mr. Harmon testified in rebuttal that some of the factors that could decrease return  
19 flow as a result of a water right transfer are as follows: (1) the distance from the  
20 proposed diversion point to the proposed place of use is greater than the distance  
21 from the existing diversion point to the existing place of use; (2) the soil at the  
22 proposed place of use causes greater consumptive use of water; (3) the proposed  
23 ditch is less water efficient than the existing ditch, particularly where the proposed  
24 ditch is much bigger than the existing ditch; and (4) at least a portion of the  
25 proposed ditch flows outside the Gila subflow zone.

26 41. Freeport did not provide sufficient facts for the Court to find whether any  
27 significant changes in return flow timing or amount result from its Applications  
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1 that transfer a water right within the same canal (“intra-canal”) or from one canal  
2 to another (“inter-canal”).<sup>10</sup>

3 42. Cospers Crossing is a point on the Gila River in the Duncan-Virden Valley.

4 43. From time to time each year, surface flow of the Gila River is not visible at  
5 Cospers Crossing, and the river travels downstream only as subflow; this  
6 condition is known as “Dry” at Cospers Crossing.

7 44. When Cospers Crossing is Dry, the Commissioner allows the entire surface flow  
8 of the Gila River to be diverted by the Duncan-Virden Valley water users upstream  
9 of Cospers Crossing in disregard of the senior rights to apportioned water  
10 downstream, including Safford Valley water rights.

11 45. Mr. Page testified that the wells that Freeport proposes to use to divert Gila River  
12 water in Applications 122, 151 and 162 are located within the subflow zone of the  
13 Gila River and therefore indeed would take waters of the Gila River.

14 46. Mr. Page testified that the depletion rate of the flow of the Gila River as a result of  
15 pumping subflow depends on the pumping rate, the duration of pumping, the  
16 distance from the well to the stream, and other hydraulic properties.

17 47. Mr. Page testified that the time lag between the start of pumping and the start of  
18 stream depletion, the rate of depletion, and the extent of continued depletion after  
19 pumping stops can all be determined using the depletion rate variables he  
20 enumerated.

21 48. Mr. Harmon testified in rebuttal that shallow well diversions such as the ones  
22 Freeport proposes to use in Applications 122, 151 and 162 cause a time-lagged  
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24 <sup>10</sup> Mr. Harmon testified in rebuttal that, if Freeport’s transfers are within the same canal  
25 (“intra-canal”) or from one canal to another (“inter-canal”), Mr. Harmon does not “expect”  
26 any significant changes in return flow timing or amount, but Mr. Harmon did not support this  
27 general conclusion with any facts nor conduct an Application by Application analysis, and  
28 the Court therefore cannot find that Mr. Harmon’s expectation is correct. The Court notes  
that Mr. Harmon himself stated that “a site-specific analysis would need to be done for each  
individual application to specifically quantify any impacts.”

1 depletive effect on the stream from whose alluvium they pump, instead of the  
2 immediate stream depletion seen when diversions are through a canal headgate.

3 49. Mr. Harmon testified in rebuttal that, for Freeport's Applications 122, 151 and 162  
4 that propose to change the diversion from a canal in the Safford Valley to a well or  
5 river pump in the Duncan-Virden Valley above Cosper's Crossing, the time-lag  
6 effect on the surface flow that will occur as a result of the diversion of water from  
7 the underground alluvium may cause Cosper's Crossing to go Dry at a later time.

8 50. A new diversion of Gila River water above Cosper's Crossing depletes the stream  
9 and decreases the amount of water available at Cosper's Crossing.<sup>11</sup>

10 51. Mr. Page testified that the Commissioner does not currently administer the Decree  
11 with respect to subflow of the Gila River pumped from wells.

12 52. Mr. Page testified that, because of the commingling of water pumped from wells  
13 with surface diversions, it would be "nearly impossible" for the Commissioner to  
14 monitor the rate and volume of water diverted by wells for use on Decree land.

15 53. Mr. Allen Gookin testified that diversions of Decree water by well are not included  
16 in the call system as it currently operates and that the Decree's call system must be  
17 modified to accommodate well diversions.

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20 <sup>11</sup> In Applications 122, 151 and 162, Freeport proposes to move Decree water rights from the  
21 Safford Valley below Cosper's Crossing to the Duncan-Virden Valley above Cosper's  
22 Crossing. It stands to reason that adding new diversions above Cosper's Crossing, whether  
23 they be surface diversions or diversions by "river pump" or well-diversions that were not  
24 previously present above Cosper's Crossing--will deplete the flow of the Gila River at  
25 Cosper's Crossing. The fact that the Duncan-Virden Valley is at a higher elevation than the  
26 Safford Valley does not change this fact. Mr. Harmon offers a general conclusion that  
27 Freeport's Applications will not result in a net decrease in the amount of water available in  
28 the "Upper Gila River basin," and he addresses the time-lag effect of well pumping above  
Cosper's Crossing, but he does not specifically address the stream depletion at Cosper's  
Crossing as a result of the addition of diversions above Cosper's Crossing. The Court finds  
that there is necessarily a net decrease in the amount of water available at Cosper's Crossing  
as a result of the addition of new diversions above Cosper's Crossing.

- 1 54. Mr. Gookin testified that two issues arise when a Decree party diverts water by  
2 well: (1) each well must be metered such that the Commissioner can determine the  
3 total flow rate and volume of water from both well and surface diversions being  
4 taken at any given moment, to ensure the Decree limits are not exceeded, and (2)  
5 the surface-groundwater interaction must be understood and accounted for.
- 6 55. Mr. Harmon testified that, to his knowledge, other states have some type of system  
7 to monitor diversions by wells to ensure that water rights are not exceeded.
- 8 56. Mr. Page considered the fact that Freeport has 52 pending applications to sever  
9 and transfer Decree water rights, and he testified that the cumulative impacts of  
10 multiple water right transfers should be considered because, while a single water  
11 right transfer may have a small impact, the cumulative impact of multiple water  
12 right transfers may be significant.
- 13 57. Mr. Harmon considered only the cumulative impact of Freeport Applications 122,  
14 151 and 162 that propose to change the method of diversion from a ditch to a well,  
15 and he concluded that the impact would be to slow the response of the surface  
16 water flow of the Gila River on account of the three proposed Freeport diversions.

17 **Application Form**

- 18 58. Freeport did not provide any Identification Tax Parcel numbers (or APNs) in its  
19 Applications. (Application Form, cover sheet.)
- 20 59. In all ten of its Applications, in response to Question 10 of the Application Form  
21 requesting a legal description and map or survey of the existing point of diversion,  
22 Freeport identified the existing diversion points only to the quarter-quarter section,  
23 and the "map" of each diversion point Freeport provided was simply a square  
24 representing the quarter-quarter section. (Application Form, Question 10 & Ex.  
25 10.)
- 26 60. In all ten of its Applications, in response to Question 17 of the Application Form  
27 requesting a legal description and map or survey of the proposed point of  
28

diversion, Freeport identified the proposed diversion points only to the quarter-quarter section, and the “map” of each diversion point Freeport provided was simply a square representing the quarter-quarter section. (Application Form, Question 17 & Ex. 17.)

61. In all ten of its Applications, in response to Question 11 of the Application Form requesting a legal description of the Sever Parcel, Freeport stated:

The legal description and map provided in Exhibit(s) 11 describes the approximate size and location of the water right (or portion thereof) to be transferred under this application. The water right (or portion thereof) to be transferred is currently appurtenant to lands in the township, range, section, and subdivision as described in the Globe Equity Decree. If this application is granted, the remaining portion of the water right will continue to be used within the same township, range, section, and subdivision as described in the Globe Equity Decree and in compliance with the Globe Equity Decree.

(Application Form, Question 11 & Attach. A.)

62. In all ten of its Applications, in response to Question 18 of the Application Form requesting a legal description of the Transfer Parcel, Freeport stated:

The legal description and map provided in Exhibits [exhibit numbers] describe the proposed new places of use of the transferred water right. The description provides the transferred water right’s total size and initial intended location, but future locations may change in accordance with the Globe Equity Decree. If the application is granted, the new water right will be added to the Applicant’s existing water rights in the same quarter-quarter section as described in the Globe Equity Decree, if any, and the transferred water right will be used within that township, range, section, and subdivision as described in the Globe Equity Decree and in compliance with the Globe Equity Decree. If the Applicant does not have an existing water right in the quarter-quarter section to which the water right is being transferred, then, the transferred water right will be used with that township, range, section and subdivision as described in the Globe Equity Decree on property belonging to the Applicant and in compliance with the Globe Equity Decree.

(Application Form, Question 18 & Attach. A.)

### **Freeport’s Revised Legal Descriptions**

63. In November 2009, during discovery related to the ten Freeport Applications under consideration, Freeport provided the Objecting Parties with legal descriptions of the Sever and Transfer Parcels that were different from the legal descriptions Freeport had provided in its ten Applications.



1 **The Community's Objections and the UV Forbearance Agreement**

2 64. The Enforceability Date of the UV Forbearance Agreement was December 14,  
3 2007.

4 65. Because Freeport filed all ten of the Applications under consideration on June 13,  
5 2008, Freeport filed all ten Applications within six months of the Enforceability  
6 Date.

7 66. The Community, the Tribe and the United States objected to each of the ten  
8 Applications on multiple grounds.

9 67. Although the exact identity and location of Hot Lands were to be defined by a  
10 Settlement Technical Committee, Hot Lands constitute lands that (1) have no  
11 Decree water right, (2) were irrigated between 1997 and 2001, and (3) lie in the  
12 UV Impact Zone.<sup>12</sup> (UV Forbearance Agreement at 7, ¶ 2.15.)

13 **B. Application-Specific Findings**

14 The Court now makes Findings of Fact related to two sets of legal descriptions of  
15 the Sever and Transfer Parcels. Freeport provided the first set of legal descriptions in its  
16 Applications and the revised set during discovery. Freeport requests to transfer its water  
17 rights using the revised legal descriptions and not those found in its Applications. (*E.g.*,  
18 Freeport's Proposed Findings of Fact & Conclusions of Law at 5-6 (stating that the  
19 "metes and bounds legal description and map of the proposed place of use included with  
20 Application 2008-115 incorrectly described the approximate area that Freeport intends to  
21 irrigate" and the "revised metes and bounds legal descriptions and maps prepared by  
22 Freeport for Application 2008-115 correctly describes the approximate area Freeport  
23 intends to irrigate").) The Court makes Findings of Fact for the revised legal descriptions  
24 only to allow use of those descriptions as test cases. The Court addresses whether the

25 \_\_\_\_\_

26 <sup>12</sup> The "NM 381 Acres"—the approximately 381 acres of Decree land in New Mexico  
27 described in paragraph (D)(1) of the decree in *Arizona v. California*, 376 U.S. 340, 349  
28 (1964)—are excepted from the definition of "Hot Lands." (UV Forbearance Agreement at 7,  
¶ 2.15; at 12, ¶ 2.18F.)

1 revised descriptions are properly before the Court, or whether they require new  
2 Applications, in the Conclusions of Law.

3 **Application 115 - Sever Parcel**

4 1. Describing the Sever Parcel, Application 115 seeks to change the place of  
5 diversion and place of use of 0.80 acre of the following water right found on page  
6 81, table number 7, of the Decree:

7	Name:	P.M. Merrill
8	Acreage:	39.8
9	Location: <sup>13</sup>	NE ¼ of NW ¼ of Sec. 12, Twp. 5S, Rge. 23E
10	Priority:	pre-1905

11 2. Based on the legal description and map set forth in Exhibit 11 of Application 115,  
12 the Sever Parcel lies within the named Decree acreage. (*See Attach. 1.*)<sup>14</sup>

13 3. Freeport's ownership of the Sever Parcel is uncontested.

14 4. Based on the legal description and map set forth in Exhibit 11 of Application 115,  
15 the Sever Parcel is a rectangle, approximately 0.05 acre of which lies on a road to  
16 the north and approximately 0.75 acre of which lies on irrigated farmland just east  
17 of a road and ditch. (*See id.*)

18 5. Aerial images show that at least 0.75 acre of the Sever Parcel has been irrigated  
19 farmland since at least 1953.

20 **Application 115 - Revised Sever Parcel**

21 6. The Revised Sever Parcel for Application 115 is 0.80 acre that Freeport asserts lies  
22 within the lands of the same Decree water right as Freeport identified for the  
23 Application Sever Parcel.

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24 <sup>13</sup> All locations refer to the Gila and Salt River Meridian.

25 <sup>14</sup> The attached maps were produced by the Community using the Community Database. The  
26 portion on the right of each Attachment is the relevant portion of the Decree map. The  
27 portion on the left of each Attachment shows the parcel of land formed by each legal  
28 description provided by Freeport superimposed over an aerial photo and quarter-quarter  
section lines.

- 1 7. Based on the revised data, the Revised Sever Parcel lies within the named Decree  
2 acreage. (*See Attach. 2.*)
- 3 8. Freeport's ownership of the Revised Sever Parcel is uncontested.
- 4 9. Based on the revised data, the Revised Sever Parcel is a rectangle that lies entirely  
5 on road and ditch. (*See id.*)
- 6 10. Aerial images show that the Revised Sever Parcel was road and ditch and therefore  
7 not irrigated since at least 1953.

8 **Application 115 - Transfer Parcel**

- 9 11. Describing the Transfer Parcel, Application 115 seeks to move the water right to  
10 0.80 acre of non-Decree land. (*See Attach. 3.*)
- 11 12. Aerial images show that the Transfer Parcel is desert land that was not irrigated  
12 between at 1997 and 2001.
- 13 13. The Transfer Parcel is within the UV Impact Zone. (*See id.*)

14 **Application 115 - Revised Transfer Parcel**

- 15 14. The Revised Transfer Parcel for Application 115 is 0.80 acre of non-Decree land.  
16 (*See Attach. 4.*)
- 17 15. Aerial images show that the Revised Transfer Parcel was irrigated farmland  
18 between at least 1997 and 2001.
- 19 16. The Revised Transfer Parcel is within the UV Impact Zone. (*See id.*)

20 **Application 118 - Sever Parcel**

- 21 17. Describing the Sever Parcel, Application 118 seeks to change the place of  
22 diversion and place of use of 3.40 acres of the following water right found on page  
23 82, table number 8, of the Decree:

24                   Name:       Edward Carpenter  
25                   Acreage:   25.2  
26                   Location:   SW ¼ of NW ¼ of Sec. 3, Twp. 7S, Rge. 27E  
27                   Priority:   pre-1905  
28

1 18. The legal description and map set forth in Exhibit 11 of Application 118 describes  
2 a parcel of land almost all of which (approximately 3.32 acres) lies outside the  
3 named Decree acreage and has no Decree water right. (*See Attach. 5.*)

4 19. The legal description and map set forth in Exhibit 11 of Application 118 describes  
5 a parcel of land that Freeport does not own. (*See id.*)

6 **Application 118 - Revised Sever Parcel**

7 20. The Revised Sever Parcel for Application 118 is 1.57 acres that Freeport asserts lie  
8 within the lands of the same Decree water right as Freeport identified for the  
9 Application Sever Parcel.

10 21. Based on the revised data, most of the Revised Sever Parcel lies within the named  
11 Decree acreage. (*See Attach. 6.*)

12 22. Freeport's ownership of most of the Revised Sever Parcel is uncontested. Based  
13 on the revised data, 0.10 acre of the Revised Sever Parcel lies on a neighboring  
14 parcel, the Clonts Exception Parcel, which is not owned by Freeport. (*See id.*)

15 23. Based on the revised data, the Revised Sever Parcel is an irregular shape, 1.52  
16 acres of which lie on road and canal and 0.05 acre of which lies on irrigated  
17 farmland. (*See id.*)

18 24. Aerial images show that almost all of the Revised Sever Parcel was road and canal  
19 and therefore not irrigated since at least 1953.

20 **Application 118 - Transfer Parcel**

21 25. Describing the Transfer Parcel, Application 118 seeks to move the water right to  
22 3.40 acres of non-Decree land. (*See Attach. 7.*)

23 26. Aerial images show that the Transfer Parcel was irrigated farmland between at  
24 least 1997 and 2001.

25 27. The Transfer Parcel is within the UV Impact Zone. (*See id.*)

26 **Application 118 - Revised Transfer Parcel**

27

28

1 28. The Revised Transfer Parcel for Application 118 is 1.57 acres of non-Decree land.  
2 (See Attach. 8.)

3 29. Aerial images show that the Revised Transfer Parcel was irrigated farmland  
4 between at least 1997 and 2001.

5 30. The Revised Transfer Parcel is within the UV Impact Zone. (See *id.*)

6 **Application 122 - Sever Parcel**

7 31. Describing the Sever Parcel, Application 122 seeks to change the place of  
8 diversion and place of use of 15.0 acres of the following water right found on page  
9 77, table number 4, of the Decree:

10	Name:	W.R. Chambers
	Acreage:	20.0
11	Location:	SW ¼ of NE ¼ of Sec. 1, Twp. 7S, Rge. 25E
	Priority:	pre-1905

12 32. The legal description and map set forth in Exhibit 11 of Application 122 describes  
13 a parcel of land 5.2 acres of which lie outside the named Decree acreage and have  
14 no Decree water right. (See Attach. 9.)

15 33. The legal description and map set forth in Exhibit 11 of Application 122 describes  
16 a parcel of land 5.2 acres of which Freeport does not own. (See *id.*)

17 **Application 122 - Revised Sever Parcel**

18 34. The Revised Sever Parcel for Application 122 is 15.0 acres that Freeport asserts lie  
19 within the lands of the same Decree water right as Freeport identified for the  
20 Application Sever Parcel.

21 35. Based on the revised data, the Revised Sever Parcel lies within the named Decree  
22 acreage. (See Attach. 10.)

23 36. Freeport's ownership of the Revised Sever Parcel is uncontested.

24 37. Based on the revised data, the Revised Sever Parcel is an irregular shape that lies  
25 almost entirely on river bottom; small portions of the Revised Sever Parcel lie on  
26 road and irrigated farmland. (See *id.*)

27  
28

1 38. Aerial images show that a portion of the Revised Sever Parcel was river bottom by  
2 1978 and almost all was river bottom by 1991, and therefore almost all of the  
3 Revised Sever Parcel has not been irrigated since at least 1991.

4 **Application 122 - Transfer Parcel**

5 39. Describing the Transfer Parcel, Application 122 seeks to move the water right to a  
6 15.0 acre parcel, 0.9 acre of which already has a Decree water right and 14.1 acres  
7 of which lie on non-Decree land. (*See Attach. 11.*)

8 40. Aerial images show that 14.1 acres of the Transfer Parcel were prepared for  
9 irrigation between at least 1991 and 1997, and irrigated in 2007, but it is not clear  
10 whether the Transfer Parcel was irrigated between 1997 and 2001.

11 41. Of the Transfer Parcel, 0.8 acre is road, highway and ditch.

12 42. Almost all of the Transfer Parcel is outside the UV Impact Zone. (*See id.*)

13 43. To irrigate the Transfer Parcel, Freeport proposes to use four “river pumps,” or  
14 wells, as the points of diversion.

15 **Application 122 - Revised Transfer Parcel**

16 44. The Revised Transfer Parcel for Application 122 is 15.0 acres of non-Decree land.  
17 (*See Attach. 12.*)

18 45. Aerial images show that the Revised Transfer Parcel was prepared for irrigation  
19 between at least 1991 and 1997, and irrigated in 2007, but it is not clear whether  
20 the Revised Transfer Parcel was irrigated between 1997 and 2001.

21 46. The Revised Transfer Parcel is outside the UV Impact Zone. (*See id.*)

22 47. To irrigate the Revised Transfer Parcel, Freeport apparently proposes to use four  
23 “river pumps,” or wells, as the points of diversion.

24 **Application 133 - Sever Parcel**

25 48. Describing the Sever Parcel, Application 133 seeks to change the place of  
26 diversion and place of use of 6.0 acres of the following water right found on page  
27 74, table number 1, of the Decree:  
28

Name: S.A. Merrill  
Acreage: 19.3  
Location: NE ¼ of NW ¼ of Sec. 23, Twp. 7S, Rge. 26E  
Priority: pre-1905

49. The legal description and map set forth in Exhibit 11 of Application 133 describes a parcel of land 5.5 acres of which have a Decree water right and 0.5 acre of which has no Decree water right. (*See Attach. 13.*)
50. Freeport's ownership of all but 0.5 acre of the Sever Parcel is uncontested.
51. Almost all (5.85 acres) of the Sever Parcel is commercial/residential property or road. (*See id.*)
52. Aerial images show that almost all of the Sever Parcel was irrigated until 2003, after which the land was cleared for the construction of an assay lab.

**Application 133 - Revised Sever Parcel**

53. The Revised Sever Parcel for Application 133 is 6.0 acres that Freeport asserts lie within the lands of the same Decree water right as Freeport identified for the Application Sever Parcel.
54. Based on the revised data, the Revised Sever Parcel lies within the named Decree acreage. (*See Attach. 14.*)
55. Freeport's ownership of the Revised Sever Parcel is uncontested.
56. Based on the revised data, the Revised Sever Parcel lies entirely on commercial/residential property or road. (*See id.*)
57. Aerial images show that the Revised Sever Parcel was irrigated until 2003, but by 2004 the land was cleared for the construction of an assay lab, and no water was applied to the land thereafter.

**Application 133 - Transfer Parcel 1**

58. Describing Transfer Parcel 1 (of 2), Application 133 seeks to move the water right to a 4.7 acre parcel that already has an appurtenant Decree water right. (*See Attach. 15.*)

**Application 133 - Transfer Parcel 2**



1 59. Describing Transfer Parcel 2 (of 2), Application 133 seeks to move the water right  
2 to a 1.3 acre parcel that already has an appurtenant Decree water right. (*See*  
3 Attach. 16.)

4 **Application 133 - Revised Transfer Parcel 1**

5 60. Revised Transfer Parcel 1 (of 2) for Application 133 is 4.7 acres of non-Decree  
6 land. (*See* Attach. 17.)

7 61. Aerial images show that Revised Transfer Parcel 1 was irrigated in 1953 and 1978,  
8 was apparently fallow in 1997-98, and was prepared for irrigation in 2004 and  
9 2007, but it is not clear whether Revised Transfer Parcel 1 was irrigated between  
10 1997 and 2001.

11 62. Freeport characterizes Revised Transfer Parcel 1 as irrigated grazing land.

12 63. Revised Transfer Parcel 1 is within the UV Impact Zone. (*See id.*)

13 **Application 133 - Revised Transfer Parcel 2**

14 64. Revised Transfer Parcel 2 (of 2) for Application 133 is 1.3 acres of non-Decree  
15 land. (*See* Attach. 18.)

16 65. Aerial images show that Revised Transfer Parcel 2 was irrigated farmland between  
17 at least 1997 and 2001.

18 66. Revised Transfer Parcel 2 is within the UV Impact Zone. (*See id.*)

19 **Application 138 - Sever Parcel**

20 67. Describing the Sever Parcel, Application 138 seeks to change the place of  
21 diversion and place of use of 3.7 acres of the following water right found on page  
22 29 of the Decree:

23	Name:	H.J. Nunn & T.A. Nunn
24	Acreage:	23.5
25	Location:	NW ¼ of SW ¼ of Sec. 21, Twp. 8S, Rge. 32E
26	Priority:	1888

27 68. The legal description and map set forth in Exhibit 11 of Application 138 describes  
28 a parcel of land 3.6 acres of which have a Decree water right and 0.1 acre of which  
has no Decree water right. (*See* Attach. 19.)

- 1 69. Freeport's ownership of all but 0.1 acre of the Sever Parcel is uncontested.
- 2 70. Almost all of the Sever Parcel is irrigated farmland and 0.22 acre of the Sever
- 3 Parcel is road or canal. (*See id.*)
- 4 71. Aerial images show that almost all of the Sever Parcel was irrigated until 2007,
- 5 with the exception of the portions of the Sever Parcel that are road or canal.
- 6 72. The 2009 aerial photo shows that a system of irrigation by center pivot arm has
- 7 been installed, and a portion of the Sever Parcel lies within the irrigation zone of
- 8 the center pivot arm.
- 9 73. Although Freeport states in its Application that the current diversion structure is
- 10 the Valley Canal, testimony revealed that the current diversion is by well, or river
- 11 pump, which serves the center pivot arm irrigation system.

12 **Application 138 - Revised Sever Parcel**

- 13 74. The Revised Sever Parcel for Application 138 is 3.7 acres that Freeport asserts lie
- 14 within the lands of the same Decree water right as Freeport identified for the
- 15 Application Sever Parcel.
- 16 75. Based on the revised data, 3.65 acres of the Revised Sever Parcel lie within the
- 17 named Decree acreage, and 0.05 acre lies on non-Decree land. (*See Attach. 20.*)
- 18 76. Freeport's ownership of all but 0.05 acre of the Revised Sever Parcel is
- 19 uncontested.
- 20 77. Based on the revised data, most of the Revised Sever Parcel is irrigated farmland
- 21 and 0.42 acre of the Revised Sever Parcel is road or canal. (*See id.*)
- 22 78. Aerial images show that almost all of the Revised Sever Parcel was irrigated until
- 23 2007, with the exception of the portions of the Revised Sever Parcel that are road
- 24 or canal.
- 25 79. The 2009 aerial photo shows that a system of irrigation by center pivot arm has
- 26 been installed, and a portion of the Revised Sever Parcel lies within the irrigation
- 27 zone of the center pivot arm.
- 28

1 80. Although Freeport states in its Application that the current diversion structure is  
2 the Valley Canal, testimony revealed that the current diversion is by well, or river  
3 pump, which serves the center pivot arm irrigation system.

4 **Application 138 - Transfer Parcel**

5 81. Describing the Transfer Parcel, Application 138 seeks to move the water right to  
6 3.7 acres of non-Decree land. (*See Attach. 21.*)

7 82. Aerial images show that 2.7 acres of the Transfer Parcel were irrigated farmland  
8 between at least 1997 and 2001, and 1.0 acre of the Transfer Parcel was road, berm  
9 and active river channel.

10 83. The Transfer Parcel is within the UV Impact Zone. (*See id.*)

11 **Application 138 - Revised Transfer Parcel**

12 84. The Revised Transfer Parcel for Application 138 is 3.7 acres of non-Decree land.  
13 (*See Attach. 22.*)

14 85. Aerial images show that the Revised Transfer Parcel was irrigated farmland  
15 between at least 1997 and 2001.

16 86. The Revised Transfer Parcel is within the UV Impact Zone. (*See id.*)

17 **Application 147 - Sever Parcel**

18 87. Describing the Sever Parcel, Application 147 seeks to change the place of  
19 diversion and place of use of 15.5 acres of the following water right found on page  
20 82, table number 8, of the Decree:

21	Name:	Edwin Moody
22	Acreage:	33.0; 25.0 after Transfer 101
23	Location:	NE ¼ of SW ¼ of Sec. 3, Twp. 7S, Rge. 27E
24	Priority:	pre-1905

25 88. The legal description and map set forth in Exhibit 11 of Application 147 describes  
26 a parcel of land almost all of which (approximately 15.26 acres) lies within the  
27 named Decree acreage and 0.24 acre of which lies within Decree acreage other  
28 than that named. (*See Attach. 23.*)

89. Freeport's ownership of all but 0.24 acre of the Sever Parcel is uncontested.

- 1 90. Most of the Sever Parcel (12.7 acres) is active river channel and river bottom; 1.4  
2 acres are road and canal and 1.4 acres are irrigated farmland. (*See id.*)
- 3 91. Aerial images show that most of the Sever Parcel (14.1 acres, including the river  
4 channel and bottom and the road and canal) has not been irrigated since at least  
5 1991.

6 **Application 147 - Revised Sever Parcel**

- 7 92. The Revised Sever Parcel for Application 147 is 15.5 acres that Freeport asserts lie  
8 within the lands of the same Decree water right as Freeport identified for the  
9 Application Sever Parcel.
- 10 93. Based on the revised data, all of the Revised Sever Parcel lies within the named  
11 Decree acreage. (*See Attach. 24.*)
- 12 94. Freeport's ownership of the Revised Sever Parcel is uncontested.
- 13 95. Based on the revised data, the Revised Sever Parcel is an irregular shape, 12.24  
14 acres of which lie on active river channel and river bottom, 1.81 acres of which lie  
15 on road and canal, and 1.45 acres of which lie on irrigated farmland. (*See id.*)
- 16 96. Aerial images show that most of the Revised Sever Parcel (14.05 acres, including  
17 the river channel and bottom and the road and canal) has not been irrigated since at  
18 least 1991.

19 **Application 147 - Transfer Parcel 1**

- 20 97. Describing Transfer Parcel 1 (of 2), Application 147 seeks to move the water right  
21 to a 1.4 acre parcel that already has an appurtenant Decree water right. (*See*  
22 *Attach. 25.*)

23 **Application 147 - Transfer Parcel 2**

- 24 98. Describing Transfer Parcel 2 (of 2), Application 147 seeks to move the water right  
25 to a 14.1 acre parcel, all but 0.13 acre of which is non-Decree land. (*See Attach.*  
26 *26.*)

27  
28

1 99. Aerial images show that almost all of Transfer Parcel 2 was irrigated farmland  
2 between at least 1997 and 2001; approximately 0.16 acre was road or highway.

3 100. Transfer Parcel 2 is within the UV Impact Zone. (*See id.*)

4 **Application 147 - Revised Transfer Parcel 1**

5 101. Revised Transfer Parcel 1 (of 2) for Application 147 is 1.4 acres of non-Decree  
6 land. (*See Attach. 27.*)

7 102. Aerial images show that Revised Transfer Parcel 1 was irrigated farmland between  
8 at least 1997 and 2001.

9 103. Revised Transfer Parcel 1 is within the UV Impact Zone. (*See id.*)

10 **Application 147 - Revised Transfer Parcel 2**

11 104. Revised Transfer Parcel 2 (of 2) for Application 147 is 14.1 acres of non-Decree  
12 land. (*See Attach. 28.*)

13 105. Aerial images show that almost all of Revised Transfer Parcel 2 was irrigated  
14 farmland between at least 1997 and 2001; approximately 0.7 acre was road or  
15 highway.

16 106. Revised Transfer Parcel 2 is within the UV Impact Zone. (*See id.*)

17 **Application 150 - Sever Parcel**

18 107. Describing the Sever Parcel, Application 150 seeks to change the place of  
19 diversion and place of use of 6.7 acres of the following water right found on page  
20 82, table number 8, of the Decree:

21 Name: Edwin Moody  
22 Acreage: 36.5  
23 Location: SE ¼ of NW ¼ of Sec. 3, Twp. 7S, Rge. 27E  
24 Priority: pre-1905

25 108. The legal description and map set forth in Exhibit 11 of Application 150 describes  
26 a parcel of land 4.35 acres of which lie within the named Decree acreage, 0.40 acre  
27 of which lies within Decree acreage other than that named, and 1.95 acres of  
28 which lie on non-Decree land. (*See Attach. 29.*)

1 109. Freeport's ownership is uncontested for 4.35 acres of the Sever Parcel but  
2 contested for 2.35 acres of the Sever Parcel.

3 110. The Sever Parcel is made up of 4.05 acres of river bottom, 1.25 acres of road,  
4 drainage and trees, and 1.4 acres of irrigated farmland. (*See id.*)

5 111. Aerial images show that 5.3 acres (including the river bottom and the road) of the  
6 Sever Parcel have not been irrigated since at least 1991.

7 **Application 150 - Revised Sever Parcel**

8 112. The Revised Sever Parcel for Application 150 is 4.73 acres that Freeport asserts lie  
9 within the lands of the same Decree water right as Freeport identified for the  
10 Application Sever Parcel.

11 113. Based on the revised data, 4.13 acres of the Revised Sever Parcel lie within the  
12 named Decree acreage, and 0.60 acre lies over non-Decree acreage. (*See Attach.*  
13 30.)

14 114. Freeport's ownership of 4.13 acres of the Revised Sever Parcel is uncontested.

15 115. Based on the revised data, the Revised Sever Parcel consists of 3.08 acres of river  
16 bottom, 1.00 acre of road, drainage and trees, and 0.65 acre of irrigated farmland.  
17 (*See id.*)

18 116. Aerial images show that 4.08 acres (including the river bottom and the road) of the  
19 Revised Sever Parcel have not been irrigated since at least 1991.

20 **Application 150 - Transfer Parcel**

21 117. Describing the Transfer Parcel, Application 150 seeks to move the water right to a  
22 6.7 acre parcel, 6.16 acres of which lie over already Decreed acreage. (*See Attach.*  
23 31.)

24 118. Aerial images show that 5.82 acres of the Transfer Parcel were irrigated farmland  
25 between at least 1997 and 2001; approximately 0.88 acre was canal and road.

26 119. The Transfer Parcel is within the UV Impact Zone. (*See id.*)

27 **Application 150 - Revised Transfer Parcel**

28

1 120. The Revised Transfer Parcel for Application 150 is 4.73 acres of non-Decree land.  
2 (See Attach. 32.)

3 121. Aerial images show that almost all of the Revised Transfer Parcel was irrigated  
4 farmland between at least 1997 and 2001.

5 122. The Revised Transfer Parcel is within the UV Impact Zone. (*See id.*)

6 **Application 151 - Sever Parcel 1**

7 123. Describing Sever Parcel 1 (of 2), Application 151 seeks to change the place of  
8 diversion and place of use of 10.4 acres of the following water right found on page  
9 75, table number 2, of the Decree:

10	Name:	S.N. Holman
	Acreage:	34.2
11	Location:	SW ¼ of SE ¼ of Sec. 9, Twp. 7S, Rge. 27E
	Priority:	pre-1905

12 124. The legal description and map set forth in Exhibit 11 of Application 151 describes  
13 a parcel of land 5.3 acres of which lie within the named Decree acreage and 5.1  
14 acres of which lie on non-Decree land. (*See Attach. 33.*)

15 125. Freeport's ownership is uncontested for 5.3 acres of Sever Parcel 1 but contested  
16 for 5.1 acres of Sever Parcel 1.

17 126. Sever Parcel 1 is made up of 10.4 acres of river bottom. (*See id.*)

18 127. Aerial images show that Sever Parcel 1 has not been irrigated since at least 1991.

19 128. Sever Parcel 1 overlaps with the Sever Parcel for Application 162 by 0.2 acre.  
20 (*See id.*)

21 **Application 151 - Sever Parcel 2**

22 129. Describing Sever Parcel 2 (of 2), Application 151 seeks to change the place of  
23 diversion and place of use of 4.0 acres of the following water right found on page  
24 75, table number 2, of the Decree:

25	Name:	S.N. Holman
26	Acreage:	34.2
	Location:	SW ¼ of SE ¼ of Sec. 9, Twp. 7S, Rge. 27E
27	Priority:	pre-1905

28



1 130. The legal description and map set forth in Exhibit 11 of Application 151 describes  
2 a parcel of land 2.75 acres of which lie within the named Decree acreage and 1.25  
3 acres of which lie on non-Decree land. (*See Attach. 33.*)

4 131. Freeport's ownership is uncontested for 2.75 acres of Sever Parcel 2 but contested  
5 for 1.25 acres of Sever Parcel 2.

6 132. Sever Parcel 2 is made up of 4.0 acres of river bottom. (*See id.*)

7 133. Aerial images show that Sever Parcel 2 has not been irrigated since at least 1991.

8 **Application 151 - Revised Sever Parcel**

9 134. The Revised Sever Parcel for Application 151 is 5.94 acres that Freeport asserts lie  
10 within the lands of the same Decree water right as Freeport identified for the  
11 Application Sever Parcel.

12 135. Based on the revised data, the Revised Sever Parcel lies within the named Decree  
13 acreage. (*See Attach. 34.*)

14 136. Freeport's ownership of the Revised Sever Parcel is uncontested.

15 137. Based on the revised data, the Revised Sever Parcel lies entirely on river bottom.  
16 (*See id.*)

17 138. Aerial images show that the Revised Sever Parcel has not been irrigated since at  
18 least 1991.

19 **Application 151 - Transfer Parcel 1**

20 139. Describing Transfer Parcel 1 (of 2), Application 151 seeks to move the water right  
21 to a 10.4 acre parcel, 8.21 acres of which lie over already Decreed acreage. (*See*  
22 *Attach. 35.*)

23 140. Aerial images show that 9.8 acres of Transfer Parcel 1 were irrigated farmland  
24 between at least 1997 and 2001; approximately 0.60 acre was river bottom and  
25 road.

26 141. Transfer Parcel 1 is within the UV Impact Zone. (*See id.*)

27

28

1 142. To irrigate Transfer Parcel 1, Freeport proposes to use four “river pumps,” or  
2 wells, as the points of diversion.

3 **Application 151 - Transfer Parcel 2**

4 143. Describing Transfer Parcel 2 (of 2), Application 151 seeks to move the water right  
5 to a 4.0 acre parcel which lies on non-Decree land. (*See Attach. 36.*)

6 144. Aerial images show that 2.72 acres of Transfer Parcel 2 were irrigated farmland  
7 between at least 1997 and 2001; approximately 1.28 acres were road or highway  
8 and idle land.

9 145. Transfer Parcel 2 is outside the UV Impact Zone. (*See id.*)

10 146. To irrigate Transfer Parcel 2, Freeport proposes to use four “river pumps,” or  
11 wells, as the points of diversion.

12 **Application 151 - Revised Transfer Parcel**

13 147. The Revised Transfer Parcel for Application 151 is 5.94 acres of non-Decree land.  
14 (*See Attach. 37.*)

15 148. Aerial images show that 4.77 acres of the Revised Transfer Parcel were irrigated  
16 farmland between at least 1997 and 2001; 1.17 acres were road and river bottom.

17 149. The Revised Transfer Parcel is within the UV Impact Zone. (*See id.*)

18 150. Freeport’s intended point of diversion for the irrigation of the Revised Sever  
19 Parcel is unspecified.

20 **Application 162 - Sever Parcel**

21 151. Describing the Sever Parcel, Application 162 seeks to change the place of  
22 diversion and place of use of 8.4 acres of the following water right found on page  
23 50 of the Decree:

24	Name:	S.N. Holman
25	Acreage:	20.7
26	Location:	SE ¼ of SW ¼ of Sec. 9, Twp. 7S, Rge. 27E
27	Priority:	1904

28

- 1 152. The legal description and map set forth in Exhibit 11 of Application 162 describes  
2 a parcel of land 2.82 acres of which lie within the named Decree acreage and 5.58  
3 acres of which lie on non-Decree land. (*See Attach. 38.*)
- 4 153. Freeport's ownership is uncontested for 2.82 acres of the Sever Parcel but  
5 contested for 5.58 acres of the Sever Parcel.
- 6 154. The Sever Parcel is made up of 8.4 acres of river bottom. (*See id.*)
- 7 155. Aerial images show that the Sever Parcel has not been irrigated since at least 1991.
- 8 156. The Sever Parcel for Application 162 overlaps with Sever Parcel 1 of Application  
9 151 by 0.2 acre. (*See id.*)

10 **Application 162 - Revised Sever Parcel**

- 11 157. The Revised Sever Parcel for Application 162 is 2.91 acres that Freeport asserts lie  
12 within the lands of the same Decree water right as Freeport identified for the  
13 Application Sever Parcel.
- 14 158. Based on the revised data, the Revised Sever Parcel lies within the named Decree  
15 acreage. (*See Attach. 39.*)
- 16 159. Freeport's ownership of the Revised Sever Parcel is uncontested.
- 17 160. Based on the revised data, the Revised Sever Parcel lies entirely on river bottom.  
18 (*See id.*)
- 19 161. Aerial images show that the Revised Sever Parcel has not been irrigated since at  
20 least 1991.

21 **Application 162 - Transfer Parcel 1**

- 22 162. Describing Transfer Parcel 1 (of 3), Application 162 seeks to move the water right  
23 to a 0.5 acre parcel, 0.28 acre of which lies over already Decreed acreage. (*See*  
24 *Attach. 40.*)
- 25 163. Aerial images show that 0.36 acre of Transfer Parcel 1 was irrigated farmland  
26 between at least 1997 and 2001; approximately 0.14 acre was river canal and road.  
27  
28

1 164. Half (0.25 acre) of Transfer Parcel 1 is within the UV Impact Zone, and half (0.25  
2 acre) is outside the UV Impact Zone. (*See id.*)

3 165. To irrigate Transfer Parcel 1, Freeport proposes to use four “river pumps,” or  
4 wells, as the points of diversion.

5 **Application 162 - Transfer Parcel 2**

6 166. Describing Transfer Parcel 2 (of 3), Application 162 seeks to move the water right  
7 to 0.48 acre of non-Decree land. (*See Attach. 41.*)

8 167. Aerial images show that almost all (0.45 acre) of Transfer Parcel 2 was irrigated  
9 farmland between at least 1997 and 2001.

10 168. Transfer Parcel 2 is outside the UV Impact Zone. (*See id.*)

11 **Application 162 - Transfer Parcel 3**

12 169. Describing Transfer Parcel 3 (of 3), Application 162 seeks to move the water right  
13 to 7.42 acres of non-Decree land. (*See Attach. 41.*)

14 170. Aerial images show that 5.95 acres of Transfer Parcel 3 were irrigated farmland  
15 between at least 1997 and 2001; approximately 1.47 acres were road and ditch.

16 171. Transfer Parcel 3 is outside the UV Impact Zone. (*See id.*)

17 **Application 162 - Revised Transfer Parcel**

18 172. The Revised Transfer Parcel for Application 162 is 2.91 acres of non-Decree land.  
19 (*See Attach. 42.*)

20 173. Aerial images show that 1.91 acres of the Revised Transfer Parcel were irrigated  
21 farmland between at least 1997 and 2001; approximately 1.00 acre was road and  
22 ditch.

23 174. The Revised Transfer Parcel is outside of the UV Impact Zone. (*See id.*)

24 **Application 166 - Sever Parcel**

25 175. Describing the Sever Parcel, Application 166 seeks to change the place of  
26 diversion and place of use of 8.17 acres of the following water right found on page  
27 83, table number 10, of the Decree:  
28

Name: W.A. Lines  
Acreage: 10.2  
Location: NE ¼ of SW ¼ of Sec. 18, Twp. 6S, Rge. 25E  
Priority: pre-1905

176. The legal description and map set forth in Exhibit 11 of Application 166 describes a parcel of land 6.03 acres of which lie on Decree acreage other than that named and 2.14 acres of which lie on non-Decree land. (*See Attach. 43.*)

177. Freeport's ownership of the Sever Parcel is contested.

178. The Sever Parcel is made up of 8.17 acres of idle field, trees and drainage. (*See id.*)

179. Aerial images show that the Sever Parcel has not been irrigated since at least 1978.

**Application 166 - Revised Sever Parcel**

180. The Revised Sever Parcel for Application 166 is 8.17 acres that Freeport asserts lie within the lands of the same Decree water right as Freeport identified for the Application Sever Parcel.

181. Based on the revised data, 7.89 acres of the Revised Sever Parcel lie on Decree acreage other than that named, and 0.28 acre lies on non-Decree land. (*See Attach. 44.*)

182. Freeport's ownership of the Revised Sever Parcel is contested.

183. Based on the revised data, the Revised Sever Parcel is made up of idle field, trees and drainage. (*See id.*)

184. Aerial images show that the Revised Sever Parcel has not been irrigated since at least 1978.

**Application 166 - Transfer Parcel**

185. Describing the Transfer Parcel, Application 166 seeks to move the water right to 8.17 acres of non-Decree land. (*See Attach. 45.*)

186. Aerial images show that 4.15 acres of the Transfer Parcel were irrigated farmland between at least 1997 and 2001; approximately 4.02 acres were idle field or trees.

187. The Transfer Parcel is within the UV Impact Zone. (*See id.*)

1 188. Freeport characterizes the Transfer Parcel as an intended habitat mitigation site.

2 **Application 166 - Revised Transfer Parcel**

3 189. The Revised Transfer Parcel for Application 166 is 8.17 acres of non-Decree land.  
4 (See Attach. 46.)

5 190. Aerial images show that 4.17 acres of the Revised Transfer Parcel were irrigated  
6 farmland between at least 1997 and 2001; approximately 4.00 acres were idle field  
7 or trees.

8 191. The Revised Transfer Parcel is within the UV Impact Zone. (*See id.*)

9 192. Freeport characterizes the Revised Transfer Parcel as an intended habitat  
10 mitigation site.

11 **III. CONCLUSIONS OF LAW**

12 **A. Map Accuracy**

13 Accurate maps and legal descriptions of the Sever Parcel and Transfer Parcel are  
14 critical to the evaluation of an application to sever and transfer a Decree water right. The  
15 Change in Use Rule lists among its requirements the following:

- 16 C. The application shall be in such form as prescribed by the  
17 Commissioner and shall include: . . .
  - 18 2. Location of existing point of diversion or place of use (legal  
description and map/survey) and [present] manner of use;
  - 19 3. Location of proposed new point of diversion [or] place of use (legal  
20 description and map/survey) and proposed new manner of use; . . .
  - 21 6. Reference to the Gila Decree wherein the water right was defined  
and adjudicated and the priority date of such right;
  - 22 7. Purpose of existing use and proposed purpose of use; . . .
  - 23 11. A description of the historical use of the water right for the last ten  
24 (10) years;
  - 25 12. Such other information as may be necessary to permit complete  
understanding of the proposed change.

26 (Change in Use Rule, § (IV)(1)(C).) The Change In Use Rule further provides that  
27  
28

1 “[t]he applicant shall have the burden of establishing a prima facie case of no injury to the  
2 rights of other parties under the Gila Decree and a right to transfer. Upon making such a  
3 prima facie showing, the burden of proof [] will shift from the applicant to the objecting  
4 party to demonstrate that injury will result from the proposed change or that the applicant  
5 has no right to the proposed transfer.” (*Id.*, § (IV)(4)(B).) An Article V Decree water  
6 right belonging to a UV Defendant is appurtenant to the specific tract of land through the  
7 irrigation of which the right was acquired. (*See* Case No. CV 31-0059-TUC-SRB, Docs.  
8 7295 & 7353, Orders.)

9         With regard to the ten Applications under consideration, Freeport and the  
10 Objecting Parties provided the Court with various maps and data to try to substantiate  
11 their arguments regarding whether Freeport’s proposed Decree water right transfers are  
12 valid. Particularly noteworthy among these data is the Community Database because it  
13 contains the digitized and georectified Decree Maps, aerial imagery, the UV Impact Zone,  
14 and a wealth of other relevant information. The Court is satisfied that the maps and other  
15 data in the Community Database are sufficiently accurate for purposes of evaluating the  
16 ten Freeport Applications under consideration *and* Applications to sever and transfer a  
17 Decree water right generally.<sup>15</sup> *See United States v. Alpine Land & Reservoir Co.*  
18 (*“Alpine V”*), 291 F.3d 1062, 1075 n.18 (9th Cir. 2002). Going forward, the location of a  
19 Decree water right shall be presumed to be established through the use of the Community  
20 Database and the incorporated digitized and georectified Decree Maps.<sup>16</sup> The  
21 presumption of the location of a Decree water right shall be subject to rebuttal by an  
22 applicant or objecting party that can show that the Community Database is inaccurate as  
23 to the location of the Decree water right in question.

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24  
25  
26 <sup>15</sup> The assessor parcel data are only sufficiently accurate to the extent that they indicate an  
APN for a parcel of land under consideration.

27 <sup>16</sup> The Court intends to accept the Community’s offer of the Community Database for use in  
28 the Commissioner’s office.



**B. Forfeiture and Abandonment of a Decree Water Right**

With regard to the possibility that a Decree water right may be forfeited or abandoned, the Change in Use Rule states as follows:

- (1) No change in the point of diversion, place, means, manner or purpose of use shall be made under these Rules with respect to any decreed right to water which, under applicable law, has been forfeited or abandoned.
- (2) The Commissioner is not authorized to make any determination as to whether a water right has or has not been abandoned or forfeited. If an objection to an application is that the water right has been abandoned or forfeited, such objection shall be determined in proceedings before the United States District Court under Section 4 herein, and the Commissioner shall not deny an application on the basis of abandonment or forfeiture.

(Change in Use Rule, § (IV)(1)(H).) The Application Form requests facts related to forfeiture and abandonment by asking the applicant for a description of the historical use of the water right on the Sever Parcel for the last ten years. (Question 14.) The burden to show that a particular Decree water right has been forfeited or abandoned is on the objecting party. (*See* Doc. 25, Order at 2.)

**1. Forfeiture**

The Arizona Legislature provided that a surface water right could be forfeited through non-use in the first Water Code, enacted in 1919.<sup>17</sup> The Code provided that

[b]eneficial use shall be the basis and the measure and the limit to the use of water in the State and whenever hereafter the owner of a perfected and developed right shall cease or fail to use the water appropriated for a period of five (5) successive years the right to use shall thereupon cease and revert to the public and become again subject to appropriation in the manner herein provided. But nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act.

Laws of Ariz., ch. 164, § 1 (1919) (amended 1921); *see also Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 118 P.3d 1110, 1115 (Ariz. Ct. App. 2005).

---

<sup>17</sup> All of the Decree water rights at issue here are located in Arizona, so the applicable law of forfeiture and abandonment is Arizona law. The Court will address forfeiture and abandonment under New Mexico law if and when issues regarding Decree water rights located in New Mexico are before the Court.

1 In 1995, the Legislature made amendments to the Water Code that included  
 2 provisions stating that forfeiture did not apply to water rights that vested prior to June 12,  
 3 1919, the date the first Water Code was enacted. *See* Ariz. Rev. Stat. (“A.R.S.”) §§ 45-  
 4 141(C) & 188(A) (2010); *San Carlos Apache Tribe v. Superior Ct. ex rel. County of*  
 5 *Maricopa*, 972 P.2d 179, 187 (Ariz. 1999). In examining the language of the Water Code  
 6 amendments for constitutionality, the Arizona Supreme Court concluded that, by  
 7 explicitly exempting pre-1919 water rights from forfeiture in 1995, the Legislature  
 8 provided protection for pre-1919 water rights that may have already been forfeited before  
 9 1995 to the detriment of junior water right appropriators that had acquired water rights as  
 10 a result of the possible forfeitures. *Id.* at 189. In other words, the 1995 amendments had  
 11 possibly changed the legal consequence of events completed before 1995 and thereby  
 12 affected junior appropriators’ vested property rights. *Id.* at 191. The court therefore  
 13 concluded that, by their language, the 1995 amendments were invalid. *Id.* at 192. The  
 14 Arizona Legislature has not amended the relevant sections of the Water Code since the  
 15 Arizona Supreme Court held them unconstitutional in 1999.

16 The question that is relevant to the case presently before this Court and that the  
 17 Arizona Supreme Court did not consider in *San Carlos Apache Tribe*, or any other case, is  
 18 whether the terms of the 1919 Water Code actually permitted the five-year forfeiture  
 19 provision to be applied to pre-1919 water rights in the first place, notwithstanding the  
 20 Legislature’s 1995 amendments.<sup>18</sup> The answer to that question is no.

---

21  
 22 <sup>18</sup> The parties do not cite any cases in which a court has considered whether the terms of  
 23 Arizona’s 1919 Water Code permit pre-1919 water rights to be subjected to the five-year  
 24 forfeiture provision. In *Gila Water Company v. Green* (“*Green II*”), the Arizona Supreme  
 25 Court remanded a case in which the Court had found that a water company had not  
 26 abandoned its 1893 right to build a dam with instructions to the trial court to determine  
 27 whether the right had been forfeited. 241 P. 307, 308 (Ariz. 1925). However, the question  
 28 of forfeiture in that case arose under paragraph 5338 of Arizona’s Civil Code of 1913, which  
 stated that the “failure within a reasonable time . . . to construct such reservoir, dam, or canal  
 . . . or to use reasonable diligence after such construction to maintain the same, shall be held  
 to work a forfeiture of such right to the water or waters to be appropriated.” That Court did

1 In cases with similar relevant facts to the case before the Court, Nevada state and  
2 federal courts have addressed whether statutory forfeiture applies to water rights that  
3 vested before that state's Water Code. Nevada enacted its first Water Code in 1913, and,  
4 like Arizona's Water Code, it provided that a water right was forfeited after five  
5 consecutive years of non-use. *See* Laws of Nev., ch. 140, § 8 (1913); Nev. Rev. Stat.  
6 ("N. R. S.") § 533.060(B) (1987) (repealed 1999). As in Arizona, the first Nevada Water  
7 Code also contained a savings clause that provided that "[n]othing contained in this  
8 chapter shall impair the vested right of any person to the use of water, nor shall the right  
9 of any person to take and use water be impaired or affected by any of the provisions of  
10 this chapter where appropriations have been initiated in accordance with law prior to  
11 March 22, 1913." Laws of Nev., ch. 140, § 84 (1913); N.R.S. § 533.085 (2010).

12 The Nevada Supreme Court was presented with the question of whether the 1913  
13 Nevada Water Code's forfeiture provision applied to surface water rights that vested  
14 before 1913 in *In re Manse Spring & Its Tributaries, Nye County*, 108 P.2d 311 (Nev.  
15 1940). That court concluded that application of the forfeiture provision to pre-1913  
16 surface water rights would certainly impair those rights in contravention of the 1913  
17 Nevada Water Code's savings clause, because "forfeiture presents a much stricter and  
18 more absolute procedure than loss by abandonment" due to the fact that forfeiture  
19 requires no showing of intent of the water user. *Id.* at 314-16. As a result, the court held  
20 that pre-1913 water rights could only be lost in accordance with the law that was in place  
21 in Nevada before 1913—the law of abandonment. *Id.* at 316.

22 The Ninth Circuit Court of Appeals has had several occasions to apply Nevada law  
23 to the question of forfeiture of a pre-1913 Nevada surface water right. In cases involving  
24 the rights to the waters of the Carson and Truckee Rivers, the court has consistently cited  
25 *Manse Spring* for the proposition that, by the terms of the 1913 Nevada Water Code,

26 \_\_\_\_\_  
27 not address forfeiture based on the failure to beneficially use a water right for five  
28 consecutive years as specified in the 1919 Water Code or whether pre-1919 water rights were  
subject to that provision in light of the Water Code's savings clause.

1 Nevada's forfeiture provision does not apply to pre-1913 water rights. *United States v.*  
 2 *Alpine Land & Reservoir Co.* ("Alpine VII"), 510 F.3d 1035, 1039 (9th Cir. 2007); *United*  
 3 *States v. Alpine Land & Reservoir Co.* ("Alpine VI"), 340 F.3d 903, 914 (9th Cir. 2003);  
 4 *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 941-42 (9th Cir. 2001); *United*  
 5 *States v. Alpine Land & Reservoir Co.* ("Alpine III"), 983 F.2d 1487, 1495 (9th Cir.  
 6 1993). In *Orr Water Ditch*, the court explained:

7 For water-right holders whose rights had vested by 1913, or who had  
 8 already initiated appropriations of their rights by that date, the new  
 9 forfeiture statute could work unfairly because these holders had obtained or  
 10 initiated appropriations of their rights on the understanding that those rights  
 11 would not be subject to forfeiture. Indeed, with respect to those individuals,  
 12 the statute could be more than just unfair; it could even be unconstitutional,  
 13 for its removal of one stick from the bundle of sticks comprising a water  
 14 right could be seen as an unconstitutional taking of property. The Nevada  
 15 legislature alleviated concerns about unfairness and unconstitutionality by  
 16 exempting both categories of holders from forfeiture under § 533.060. If a  
 17 holder either possessed a vested water right on March 13 [sic], 1913, or had  
 18 initiated appropriation of a water right by that date, the right-holder was  
 19 protected from forfeiture by § 533.085 [i.e. the savings clause].

20 256 F.3d at 942.

21 By providing that nothing in the 1919 Water Code "shall be so construed as to take  
 22 away or impair the vested rights which [anyone] may have to any water at the time of  
 23 passage of this act," the Arizona Legislature included an almost identical savings clause  
 24 in its Water Code as that found in Nevada's 1913 Water Code. *See* Laws of Ariz., ch.  
 25 164, § 1 (1919) (amended 1921). Applying the same reasoning as the Nevada Supreme  
 26 Court did, Arizona's forfeiture provision does not apply to pre-1919 water rights by the  
 27 terms of the 1919 Water Code; pre-1919 water rights can only be lost in accordance with  
 28 the law that was in place in Arizona before 1919—the law of abandonment and adverse  
 possession.<sup>19</sup>

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29 <sup>19</sup> The Court notes that other western state legislatures have amended their Water Codes to  
 30 subject pre-Code water rights to a forfeiture provision, but the statutory framework in those  
 31 states differs from that in Arizona and Nevada. *See, e.g., In re Water Appropriation No.*  
 32 *442A*, 313 N.W.2d 271, 274 (Neb. 1981) (upholding a forfeiture provision applicable to all  
 33 water rights as a reasonable state regulation in the absence of a savings clause for pre-Code

1 All ten of Freeport's Applications involve water rights that vested before 1919. As  
 2 a result, none of these rights is subject to Arizona's law of forfeiture. However, Decree  
 3 water rights in Arizona that vested after June 12, 1919, are not protected from Arizona's  
 4 forfeiture statute because those rights were acquired with notice of the 1919 Water Code.  
 5 *See Orr Water Ditch*, 256 F.3d at 943.

## 6 2. Abandonment

### 7 a. Legal Standards

8 In Arizona, a water right may also be lost by abandonment, which "is a matter of  
 9 intent as such intent may be evidenced by the declaration of the party, or as may be fairly  
 10 inferred from his acts." *Gould v. Maricopa Canal Co.*, 76 P. 598, 601 (Ariz. Terr. 1904);  
 11 *see also* A.R.S. §§ 45-188(A), (B). The determination of whether a water right has been  
 12 abandoned therefore "depends upon the facts and circumstances surrounding each  
 13 particular case." *Landers v. Joerger*, 140 P. 209, 210 (Ariz. 1914) (quoting Kinney on  
 14 Irrigation and Water Rights, § 1116, vol. 2). Although the cessation of the beneficial use  
 15 of a water right on the land to which it is appurtenant is required, the intent of the water  
 16 right holder is the "paramount object" of the abandonment inquiry. *Gila Water Co. v.*  
 17 *Green* ("Green I"), 232 P. 1016, 1019 (Ariz. 1925). Arizona law provides that the  
 18 abandonment of personal property, including water taken into a pipe, must be proved by  
 19 the party asserting abandonment with clear and convincing evidence, although Arizona  
 20 courts have not explicitly applied that evidentiary standard to the abandonment of a  
 21 surface water right. *See Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 661 (Ariz. Ct.  
 22 App. 2008).

23  
 24  
 25 water rights); *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 649 (Tex. 1971)  
 26 (enforcing a ten-year forfeiture provision enacted in 1957 on a pre-1957 water right so long  
 27 as the water right holder had a reasonable time to protect its interests); *State Dep't of Ecology*  
 28 *v. Grimes*, 852 P.2d 1044, 1055 (Wash. 1993) (enforcing a forfeiture provision enacted in  
 1967 that explicitly covers pre-Code water rights).

1 Arizona courts have rarely had the opportunity to elaborate on the types of acts by  
2 a water right holder that can imply abandonment of the water right. In *Green I*, the  
3 predecessor in interest to the Gila Water Company had constructed a dam across the Gila  
4 River in 1893-94, but the dam washed out within a year of its construction. 232 P. at  
5 1017. The Gila Water Company subsequently prevailed in litigation over the right to re-  
6 build the dam and the associated surface water rights. *Id.*; see also *Gila Bend Reservoir*  
7 *& Irrigation Co. v. Gila Water Co.*, 76 P. 990, 991 (Ariz. Terr. 1904), *aff'd*, 202 U.S. 270  
8 (1906). The Gila Water Company then filed applications for a canal right-of-way in 1907  
9 and reservoir site in 1909, and, after a challenge to the reservoir site application was  
10 resolved in the Gila Water Company's favor, it ultimately secured approval in 1916. 232  
11 P. at 1017, 1019. The Gila Water Company re-built the dam from 1919 to 1921, and Mr.  
12 Green, an upstream landowner, then sued the Gila Water Company for the flooding of his  
13 land. *Id.* at 1016.

14 Among his claims, Mr. Green alleged that, because 25 years had passed from the  
15 destruction of the first dam to the construction of the second, the Gila Water Company  
16 had abandoned its surface water rights. *Id.* at 1019. The court stated that "[i]t is true that  
17 this fact unexplained would be very strong evidence of an intention to abandon." *Id.*  
18 However, observing that the Gila Water Company had "stubbornly fought" for its water  
19 rights over the entire period of non-use, the court concluded that the Gila Water Company  
20 had "a most valid excuse for this delay." *Id.* The court found that the three year period  
21 from the moment the Gila Water Company finally obtained the rights to surface water and  
22 the construction of associated works to the moment it began construction of the dam was  
23 reasonable, and no person could reasonably conclude from the evidence that the Gila  
24 Water Company intended to abandon its rights. *Id.*

25 *Green I* teaches that an extended period of failure to use a water right beneficially  
26 is evidence of an intent to abandon, but the failure can be excused by the vigorous  
27 assertion of the water right in legal or other proceedings because this activity is  
28



1 inconsistent with an intent to abandon. Arizona statutes provide other valid excuses for  
2 the failure to use a surface water right beneficially, including the exchange for or  
3 substitution of groundwater, effluent, Colorado River water, or another source of surface  
4 water for the surface water right.<sup>20</sup> A.R.S. § 45-141(E).

5 In the absence of other guidance from Arizona courts relevant to the issues  
6 presented here, the Court again finds similar cases decided by Nevada federal courts  
7 instructive. Those courts have been called on many times to resolve objections filed by  
8 the Pyramid Lake Paiute Tribe of Indians (“Paiute Tribe”) and the United States to  
9 proposed transfers of water rights by holders of rights to Carson and Truckee River water.  
10 *See, e.g., Alpine VII*, 510 F.3d at 1037; *Orr Water Ditch*, 256 F.3d at 938. Nevada applies  
11 the clear and convincing standard to evidence of abandonment provided by the party  
12 asserting abandonment. *Alpine VI*, 340 F.3d at 909; *United States v. Alpine Land &*  
13 *Reservoir Co. (“Alpine IV”)*, 27 F. Supp. 2d 1230, 1241 (D. Nev. 1998). Non-use of a  
14 water right by its holder “is some evidence of an intent to abandon the right and the  
15 longer the period of non-use, the greater the likelihood of abandonment.”<sup>21</sup> *Alpine IV*, 27  
16 F. Supp. 2d at 1241; *see also Alpine III*, 983 F.2d at 1494 n.8. Partial non-use of a water  
17 right may result in a partial abandonment of the right. 27 F. Supp. 2d at 1237 (citing *State*  
18 *v. Hagerman Water Right Owners*, 947 P.2d 400, 408 (Idaho 1997)). Nevada courts

---

20 <sup>20</sup> In the context of statutory forfeiture (for failure to beneficially use a water right for five  
21 consecutive years notwithstanding the water right holder’s intent), the Arizona Legislature  
22 has provided other valid excuses for non-use, including drought, service in the military, legal  
23 proceedings, water use restrictions, conservation requirements, change in use from irrigation  
24 to municipal, maintenance of water storage or distribution facilities, minimum pool  
25 requirements, use of water on a smaller parcel of land, agreements with reservoir operators,  
forbearance for the benefit of another appropriator, and any other reason found by a court.  
A.R.S. § 45-189(E).

26 <sup>21</sup> Neither Nevada nor Arizona law has provided for a presumption of an intent to abandon  
27 a water right upon a showing of a prolonged period of non-use, but both provide that a period  
28 of non-use raises an inference of an intent to abandon. *See Orr Water Ditch*, 256 F.3d at  
945; *Green I*, 232 P. at 1019.



1 consider whether a structure or improvement has been constructed on the land to which  
2 the water right is appurtenant that is incompatible with irrigation. *Orr Water Ditch*, 256  
3 F.3d at 946; *see also* N. R. S. § 533.045. In addition, Nevada courts consider whether the  
4 water right holder has paid operation and maintenance fees or taxes for the water right.  
5 *Orr Water Ditch*, 256 F.3d at 945-46.

6 Once the party asserting abandonment has presented evidence of an intent to  
7 abandon, such as a prolonged period of non-use, the water right holder may present  
8 evidence of the payment of fees or taxes to try to defeat a finding of abandonment.<sup>22</sup>  
9 *Alpine IV*, 27 F. Supp. 2d at 1242-43, 45. If there is only evidence of non-use against a  
10 finding that the water right holder has paid the appropriate fees or taxes, the party  
11 asserting abandonment fails to prove an intent to abandon by clear and convincing  
12 evidence under Nevada law. *Orr Water Ditch*, 256 F.3d at 946 (citing *Alpine IV*, 27 F.  
13 Supp. 2d at 1245). However, if there is evidence of both a period of non-use and  
14 construction of a structure or improvement that is inconsistent with irrigation, then  
15 evidence of the payment of fees or taxes alone does not defeat a finding of abandonment.  
16 *Id.* (citing *Alpine IV*, 27 F. Supp. 2d at 1245); *see also Alpine VI*, 340 F.3d at 916-17, 921  
17 (affirming the decision to deny a transfer application because no water had been applied  
18 to the sever parcel for seven years and it was occupied by a church and parking lot).

19 In *Alpine V* and *Alpine VI*, the Paiute Tribe and the United States objected to water  
20 right transfer applications where the water right holder had already applied the water right  
21 to land on the same farm but to which the right was not appurtenant. *Alpine VI*, 340 F.3d  
22 at 907; *Alpine V*, 291 F.3d at 1073-74. The water right holder had argued, and the district  
23 court had agreed, that intrafarm water right transfers should be exempt from a finding of  
24 abandonment under principles of equity. *Alpine VI*, 340 F.3d at 907; *Alpine V*, 291 F.3d

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25  
26 <sup>22</sup> By Nevada statute, a presumption that a water right has not been abandoned is created by  
27 a water right holder's submission of evidence that, in the previous ten years, water was  
28 actually diverted, operational costs were paid, capital improvements were made, or  
maintenance of water delivery systems was performed. N. R. S. § 533.060(4).

at 1074. The Ninth Circuit Court of Appeals disagreed, stating that, under Nevada law, a water right is appurtenant to a specific parcel of land, and improper use on another parcel does not exempt the water right from a finding of abandonment. *Alpine VI*, 340 F.3d at 908, 917. The court explained that, “[a]s to abandonment, equitable principles do not apply, even on a case-by-case basis, because transfer applicants may demonstrate that they did not have the intent to abandon and that they therefore did not abandon their water rights as a matter of law.” *Id.* at 916. The court also explained that, when objecting parties produce evidence of an intent to abandon other than non-use of the water right, such as use of the water on land to which the water right is not appurtenant, then the water right holder must show continuous beneficial use of the water *and* an attempt to transfer the water right to defeat the claim of abandonment.<sup>23</sup> *Id.* at 917.

#### b. Analysis

Considering all of these principles, the Sever Parcels in Freeport’s ten Applications fall into three basic groups with regard to the abandonment analysis: (1) land that is lying fallow; (2) land upon which a structure or improvement has existed for a prolonged period of time; (3) land upon which a structure or improvement has recently been constructed. The Court analyzes these groups and the facts and circumstances around them in turn.

The Revised Sever Parcel<sup>24</sup> for Application 151 is an example of land that is lying fallow; the Revised Sever Parcel is 5.94 acres of river bottom that have not been irrigated since at least 1991. (*See* Attach. 34.) While the Objecting Parties have shown that water has not been beneficially used on Revised Sever Parcel 151 for a prolonged period of time, they have not provided any other evidence of an intent on the part of Freeport to

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<sup>23</sup> Nevada law provides for the severance and transfer of a water right if irrigation of the land to which it is appurtenant becomes “impracticable.” N. R. S. § 533.040.

<sup>24</sup> The Court uses Freeport’s revised legal descriptions for illustrative purposes here. The Court addresses below whether the revised descriptions are properly before the Court or whether they require the submittal of new applications.

1 abandon its water right. For its part, Freeport provided evidence of a lack of an intent to  
2 abandon its water right by showing that it paid the water assessments, maintained the  
3 ditches and paid operational costs for its water right. Freeport's internal resource analysts  
4 also testified that Freeport purchased the land for the express purpose of obtaining the  
5 appurtenant Decree water right. Because the Objecting Parties have only provided  
6 evidence of prolonged non-use against Freeport's evidence that it purchased the land for  
7 the Decree water right and paid the appropriate water fees and maintenance costs—acts  
8 that are inconsistent with an intent to abandon—the Objecting Parties fail to show by clear  
9 and convincing evidence that Freeport intended to abandon its Decree water right for  
10 Revised Sever Parcel 151. *See Alpine IV*, 27 F. Supp. 2d at 1245; *Green I*, 232 P. at  
11 1019.

12 Revised Sever Parcel 115 is an example of land upon which a structure or  
13 improvement has existed for a prolonged period of time. (*See Attach. 2.*) Revised Sever  
14 Parcel 115 is a 0.8 acre parcel and the *entire* parcel has been road and ditch since at least  
15 1953. Therefore, no Decree water was applied to Revised Sever Parcel 115 for the  
16 irrigation of a crop of value since at least 1953.<sup>25</sup> The Objecting Parties have provided  
17 evidence of Freeport's intent to abandon the Decree water right appurtenant to Revised  
18 Sever Parcel 115 through both the non-use of the water right for a prolonged period of  
19 time and the construction of a structure or improvement on the parcel that is incompatible  
20 with irrigation. Freeport provided evidence that it paid the appropriate water fees and  
21 maintenance costs, but it paid those fees and costs for the entire 39.8 acre Decree parcel,  
22 39.0 acres of which is irrigated farmland and 0.8 acre of which, the Sever Parcel, is road  
23 and ditch.<sup>26</sup> While the road and ditch have existed since at least 1953, and the reporting  
24

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25 <sup>25</sup> No evidence was produced that a crop of value was cultivated in the ditch itself.

26 <sup>26</sup> Freeport also provides evidence that it participated in defending against the Pumping  
27 Complaint filed in this Court in 2001 and in settlement negotiations with the Community and  
28 others regarding its Decree water rights. However, Freeport did not establish that these  
activities tested Freeport's title to the specific parcel (and associated water rights) under

1 of actual acres “then being irrigated” for each irrigation season began in 1997,<sup>27</sup> Freeport  
 2 provides no evidence that it (or its predecessor in interest) ever tried to transfer the  
 3 Decree water right for the 0.8 acre strip containing only road and ditch or that it took any  
 4 other action to show a lack of an intent to abandon since purchasing the Decree land. The  
 5 Objecting Parties have shown by clear and convincing evidence that Freeport intended to  
 6 abandon its water right for Revised Sever Parcel 115, which would result in an  
 7 extinguishment of the Decree water right appurtenant to that 0.8 acre parcel. *See Alpine*  
 8 *VI*, 340 F.3d at 916-17, 921; *Alpine IV*, 27 F. Supp. 2d at 1245. Freeport’s Application  
 9 115, if based on the revised legal descriptions, would therefore be denied.

10 Revised Sever Parcel 133 provides an example of land upon which a structure or  
 11 improvement has recently been constructed. (See Attach. 14.) Revised Sever Parcel 133  
 12 is a 6.0 acre parcel that was irrigated farmland until 2003, but by 2004 it was cleared by  
 13 Freeport for the construction of an assay lab.<sup>28</sup> No water was applied to Revised Sever  
 14 Parcel 133 from 2004 on. Freeport began preparing its Application to sever and transfer  
 15 the Decree water right appurtenant to Sever Parcel 133 at least by January 2008 and filed

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17 consideration here or that these activities were cause for Freeport to delay actions it would  
 18 have otherwise taken with respect to the parcel under consideration here. *See Green I*, 232  
 19 P. at 1019. This evidence is therefore not probative as to whether Freeport did not intend to  
 20 abandon the 0.8 acre strip of road and ditch (Revised Sever Parcel 115) on its 39.8 acre  
 Decree parcel.

21 <sup>27</sup> See *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1472-73 (D. Ariz.  
 22 1996), *aff’d*, 117 F.3d 425 (9th Cir. 1997).

23 <sup>28</sup> Question 14 of the Commissioner’s Application Form states, “Describe the historical use  
 24 of the water right for the last ten (10) years.” On each of its Applications, Freeport  
 25 responded to Question 14 by stating that the water right being transferred “is not currently  
 26 practicable and has not been practicable” in the last ten years. This is evidence of non-use  
 27 of the water right for a prolonged period of time in support of the Objecting Parties’ claim  
 28 of abandonment. However, aerial photos from the Community Database indicate that Sever  
 Parcel 133 and Revised Sever Parcel 133 were irrigated until at least 2003, only four or five  
 years before Application 133 was prepared and submitted. Freeport’s response to Question  
 14 is therefore not supported by the evidence.

1 its Application on June 13, 2008.<sup>29</sup> By providing evidence of non-use of the water right  
2 and the construction of a structure or improvement incompatible with irrigation, the  
3 Objecting Parties have provided evidence that Freeport intended to abandon its water  
4 right. Freeport's evidence that it paid the water fees and costs is not by itself enough to  
5 overcome the Objecting Parties' evidence. *See Alpine IV*, 27 F. Supp. 2d at 1245. But  
6 that evidence combined with Freeport's preparation and filing of an Application to  
7 transfer the water right within a reasonable time of the cessation of beneficial use of the  
8 water is sufficient to defeat the Objecting Parties' abandonment claim.<sup>30</sup> *See Green I*, 232  
9 P. at 1019. The Objecting Parties thus do not meet their burden to show that Freeport  
10 intended to abandon its Decree water right for Revised Sever Parcel 133.

11 With respect to certain Applications, a structure or improvement incompatible with  
12 irrigation exists on only a part of the Sever Parcel. For example, Sever Parcel 147  
13 consists of 15.5 acres, 1.4 acres of which have been road and canal since at least 1991.  
14 (*See Attach. 23.*) Similar to Revised Sever Parcel 115, discussed above, the Objecting  
15 Parties' evidence of a prolonged period of non-use and the construction of a structure or  
16 improvement incompatible with irrigation, combined with the fact that there is no  
17 evidence that Freeport tried to transfer the Decree water right for the 1.4 acre parcel of  
18 road and canal before now, is enough to show that Freeport intended to abandon the

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20 <sup>29</sup> The Court assumes for the sake of this example only that the legal description for the  
21 *Revised* Sever Parcel discussed here had been filed by Freeport with its Application 133 on  
22 June 13, 2008.

23 <sup>30</sup> The amount of time that is reasonable depends on the facts and circumstances of each case,  
24 but a period of five years or more is presumed to be unreasonable because it is then that an  
25 unexcused statutory forfeiture would work to extinguish water rights that vested after 1919.  
26 The fact that a water right vested before 1919 does not extend the period of time that the  
27 water right holder may fail to beneficially use a water right and still avoid a finding of  
28 abandonment. Here, it appears that Freeport began preparing its Application to sever and  
transfer the water right approximately four years after it ceased applying the water to the  
land, and Freeport was also actively involved in the negotiations and finalization of the UV  
Forbearance Agreement during this period.

1 Decree water right for the 1.4 acre parcel. This results in an extinguishment of the  
2 Decree water right appurtenant to 1.4 acres of Sever Parcel 147. *See Alpine IV*, 27 F.  
3 Supp. 2d at 1237.

4 **c. Laches and Waiver**

5 Freeport asserts that the Objecting Parties' forfeiture and abandonment claims are  
6 barred by the equitable defenses of laches and waiver. The defense of laches requires a  
7 showing of a "lack of diligence" by the party against whom laches is asserted and  
8 prejudice to the party asserting laches. *Apache Survival Coal. v. United States*, 21 F.3d  
9 895, 905 (9th Cir. 1994) (quotations and citations omitted). The application of laches  
10 depends on the facts and circumstances of the particular case and is left to the sound  
11 discretion of the district court. *Id.* The defense of waiver requires a "voluntary  
12 relinquishment of a known right" by the party against whom waiver is asserted; it requires  
13 the court to examine the "mental attitude of the actor" when it purportedly gave up its  
14 right. *Royal Air Props., Inc. v. Smith*, 333 F. 2d 568, 571 (9th Cir. 1964) (quotation and  
15 citation omitted).

16 The Court first notes that there is a serious question as to whether the defenses of  
17 laches and waiver are available for Freeport to assert against the United States, because  
18 the Government is not ordinarily subject to those defenses when acting as trustee for  
19 Indian tribes such as the Tribe and the Community here. *See United States v. Ahtanum*  
20 *Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) ("The Government, which holds its  
21 interests here as elsewhere in trust for all the people, is not to be deprived of those  
22 interests by the ordinary court rules designed particularly for private disputes over  
23 individually owned pieces of property; and officers who have no authority at all to  
24 dispose of Government property cannot by their conduct cause the Government to lose its  
25 valuable rights by their acquiescence, laches, or failure to act.") (quoting *United States v.*  
26 *California*, 332 U.S. 19, 40 (1947)); *see also United States v. City of Tacoma, Wash.*, 332



1 F.3d 574, 581-82 (9th Cir. 2003); *United States v. Shakopee Mdewakanton Sioux Cmty.*,  
2 616 F. Supp. 1200, 1210 (D. Minn. 1985).

3 But even if the Court were to subject the United States, the Tribe and the  
4 Community to laches and waiver here, equity weighs against finding that those parties  
5 may not now raise claims of forfeiture and abandonment against other parties to the  
6 Decree who are trying to sever and transfer a Decree water right. Freeport argues that the  
7 Objecting Parties have known which Decree lands were not being irrigated at least since  
8 the urbanization studies were completed by the Arizona Department of Water Resources  
9 (ADWR) in 1994,<sup>31</sup> and certainly since the reporting of acres “then being irrigated” for  
10 each irrigation season began in 1997.<sup>32</sup> But if the Objecting Parties have had that  
11 information, so has Freeport. Yet there is no evidence that Freeport tried to sever and  
12 transfer the water rights that are the subject of its present Applications upon purchasing  
13 its Decree lands. Furthermore, the 1993 Change in Use Rule specifically states that a  
14 change in the place of use or diversion point of a Decree water right cannot be made if the  
15 right has been forfeited or abandoned under applicable law. (Change in Use Rule, §  
16 IV(1)(H)(1).) It would be unfair to hold a single water right holder, such as one of the  
17 Objecting Parties, responsible for constantly evaluating the hundreds of Decree water  
18 rights held by other parties for forfeiture and abandonment. The Court finds no lack of  
19 diligence on the part of the Objecting Parties and no prejudice to Freeport to support a  
20 laches claim against the Objecting Parties. Moreover, the Court finds no voluntary  
21 relinquishment of Decree water rights by the Objecting Parties to support a waiver claim  
22 against them. Thus, even if the Court could subject the Government to the defenses of  
23 laches and waiver in this case, those defenses fail.

24 **d. The Effect of Abandonment and the Payment of**  
25 **Assessments**

26 \_\_\_\_\_  
27 <sup>31</sup> See *Gila Valley Irrigation Dist.*, 920 F. Supp. at 1479.

28 <sup>32</sup> See *Gila Valley Irrigation Dist.*, 920 F. Supp. at 1472-73.

1 Under the Federal Rules of Civil Procedure, the Court treats an application as a  
 2 claim and the objections to an application, such as allegations that the applicant has  
 3 forfeited or abandoned a Decree water right, as counterclaims. (*See* Doc. 25, Order at 2;  
 4 Change in Use Rule, §§ IV(3) & (4).) A finding that the applicant has abandoned a  
 5 portion of a Decree water right results in the permanent loss of that portion of the Decree  
 6 water right.<sup>33</sup> *See Gould*, 76 P. at 601; A.R.S. §§ 45-188(A), (B). For example, if the  
 7 Court finds that Freeport abandoned 1.4 acres of a 25.0 acre parcel to which a Decree  
 8 water right is appurtenant, then Freeport now holds a Decree water right for only the  
 9 remaining 23.6 acre parcel.

10 When a water right holder permanently loses a portion of a Decree water right  
 11 through forfeiture or abandonment, the water right holder is no longer required to pay an  
 12 assessment on the lost portion of the Decree water right. Article XII of the Decree  
 13 provided for the appointment by the Court of a Water Commissioner and the securing of  
 14 funds to pay the Commissioner and his staff. (Decree, Art. XII at 112.) The Court  
 15 established a per-Decree-acre assessment on water right holders in an Order dated  
 16 December 9, 1935, and has continued to collect annual assessments since then. (*See, e.g.*,  
 17 Case No. CV 31-0059-TUC-SRB, Doc. 7303, Water Commissioner's Petition for  
 18 Approval of 2010 Operating Budget and Settlement Budget, at 1-2, 6 & Ex. A-3.)  
 19 Because forfeiture or abandonment of a portion of a Decree water right results in the  
 20 permanent loss of that right, there is no justification for the water right holder to continue  
 21 to pay an assessment on the lost portion of the Decree water right. The Court  
 22 distinguishes this instance from one in which a Decree water right holder simply does not  
 23

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24 <sup>33</sup> The Court distinguishes between a finding of forfeiture or abandonment, which the Court  
 25 makes after considering evidence from both an objecting party and the Decree water right  
 26 holder, and the 1994 findings of the ADWR regarding Decree lands that have been  
 27 urbanized. The ADWR report is only evidence of forfeiture or abandonment; the purpose  
 28 of the report was not to determine whether Decree water rights had been forfeited or  
 abandoned by law. (*See* Case No. CV 31-0059-TUC-SRB, Doc. 4470, Order on Objections  
 to ADWR Study.)



1 receive Gila River water in any given year. (*See, e.g.*, Doc. 5027, Petition of Gila Water  
 2 Commissioner to Terminate Assessments on Lands at Gila Crossing & to Extinguish  
 3 Prior Unpaid Assessments on Gila Crossing Lands; Doc. 5220, Tr. of April 24, 2001,  
 4 Hearing at 9 (ruling that assessments for the Gila Crossing Lands as specified in the  
 5 Decree must be paid notwithstanding the amount of water actually received for those  
 6 lands or the fact that they do not have a priority call in Article V of the Decree).)

7 **C. The Substantive Requirements for an Application**

8 **1. The Sever Parcel: Ownership of a Decree Water Right to**  
 9 **Transfer**

10 An applicant's showing that it owns land to which a Decree water right is  
 11 appurtenant is fundamental for the applicant to meet its burden to show that it may sever  
 12 and transfer the water right as specified in section IV(4)(B) of the Change in Use Rule.  
 13 The Rule requires that the applicant identify the Sever Parcel with a legal description and  
 14 map/survey as well as the corresponding water right as defined in the Decree.<sup>34</sup> (Change  
 15 in Use Rule, §§ IV(1)(C)(2) & (6).) The Application Form likewise requires that the  
 16 applicant identify the appropriate water right as originally described in the Decree  
 17 (Question 3), verify that the applicant holds the water right or has the consent of the water  
 18 right holder to transfer it (Question 5), and locate the Sever Parcel to which the water  
 19 right is appurtenant with a legal description and map or survey (Question 11).

20 An objecting party may then show that the applicant has no right to transfer by  
 21 demonstrating that (1) the applicant does not own the Sever Parcel or have the consent of  
 22 the owner to transfer the appurtenant water right, or (2) part or all of the Sever Parcel has  
 23 no appurtenant Decree water right, or (3) part or all of the Sever Parcel has an  
 24 appurtenant Decree water right other than that named by the applicant. The objecting  
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26  
 27 <sup>34</sup> The Rule also requires that the applicant "state under oath that the information contained  
 28 in the application is true and correct, to the best of the applicant's knowledge at the time of  
 filing." (Change in Use Rule, § IV(1)(F).)

1 party may make one or more of these showings by comparing the Sever Parcel to the  
2 Decree Maps or referring to the APNs and title information, among other data.

3 For example, in Application 118, Freeport requests to transfer a water right  
4 appurtenant to a 3.4 acre Sever Parcel that it claims is a part of a 25.2 acre Decree parcel  
5 that was owned by Edward Carpenter at the time the Decree was entered. Freeport avers  
6 that it is now the holder of the water right to be transferred and provides a legal  
7 description and map of the parcel to which it claims the water right is appurtenant.  
8 However, by comparing the plotted legal description of the Sever Parcel to the Decree  
9 Maps, the Objecting Parties demonstrate that the Sever Parcel does not fall on the named  
10 Decree acres, but instead falls on land almost all of which has never had an appurtenant  
11 Decree water right. (*See Attach. 5.*) Moreover, by researching the APNs, the Objecting  
12 Parties show that Freeport does not even own the Sever Parcel, which is part of APN 107-  
13 33-011C, but instead owns a nearby parcel, APN 107-33-011E. In other words, Freeport  
14 does not own Sever Parcel 118 as defined in its Application, and in any case Sever Parcel  
15 118 has no appurtenant Decree water right that Freeport may sever and transfer. This, by  
16 itself, is cause to deny Freeport's Application 118.

17 As a further example, in Application 166, Freeport provides a legal description for  
18 an 8.17 acre Sever Parcel, but a plot of the legal description compared to the Decree Maps  
19 shows that 6.03 acres of the Sever Parcel lie on Decree acreage other than that named in  
20 Freeport's Application. (*See Attach. 43.*) The legal description of the 8.17 acre Revised  
21 Sever Parcel 166 has a similar defect: 7.89 acres of the Revised Sever Parcel lie on  
22 Decree acreage other than that named. (*See Attach. 44.*) This is reason for the Court to  
23 deny Application 166 *and* Revised Application 166 if that revision were properly before  
24 the Court. It is fundamental that an applicant own the Sever Parcel it defines in its  
25 Application or have the consent of the Sever Parcel owner to transfer, and that the named  
26 Decree water right is appurtenant to that Sever Parcel.

27 **2. The Transfer Parcel: Crops of Value and Non-Decree Land**  
28

1 Article XI of the Decree provides

2 That the lands within the Gila River watershed for the irrigation of which  
3 rights are decreed herein are arid or semi-arid in character and require  
4 irrigation in order that crops of value may be produced thereon; that except  
5 as herein specifically provided no diversion of water from the natural flow  
6 of the stream into any ditch or canal for direct conveyance to the lands shall  
7 be permitted as against any of the parties herein except in such amount as  
8 shall be actually and reasonably necessary for the beneficial use for which  
9 the right of diversion is determined and established by this Decree.

10 (Decree, Art. XI at 112.) Article XI states that irrigation water rights under the Decree  
11 are for use on lands within the Gila River watershed for the cultivation of crops of value,  
12 limited as always by the beneficial use doctrine. Therefore, in transferring an irrigation  
13 water right under the Decree, the applicant must grow crops of value on the Transfer  
14 Parcel. Of course, the applicant must also ensure that the Transfer Parcel does not  
15 already have a Decree water right.

16 To these ends, the Change in Use Rule requires that the applicant identify the  
17 location of the Transfer Parcel with a legal description and map/survey, (§ IV(1)(C)(3)),  
18 and state the proposed purpose of use of the Decree water right, (§ IV(1)(C)(7)). The  
19 Application Form likewise requests the location of the Transfer Parcel with legal  
20 description and map/survey (Question 18) and the proposed purpose of water use  
21 (Question 21). An objecting party may then try to demonstrate defects in the application  
22 by showing that the proposed purpose of use is not permitted by the Decree, or that part or  
23 all of the Transfer Parcel lies on land that already has an appurtenant Decree water right.

24 Crops of value must be grown on the Transfer Parcel if the intended use of the  
25 Decree water remains irrigation. The Court has previously held that “the Decree was  
26 intended to establish an order of priorities for water that would be devoted primarily to  
27 agriculture” and that “the Decree does not contemplate uses that are primarily municipal  
28 (such as watering golf courses, parks, playing fields and the like, and processing sewage  
or other waste), domestic (such as watering lawns or flowers, or for pets), or industrial.”  
*Gila Valley Irrigation Dist.*, 920 F. Supp. at 1477-78. The Decree specifies that a water  
right is put to beneficial agricultural use if crops of value are being grown on the land to

1 which the right is appurtenant. *Id.* The Court has already concluded that, while a crop of  
2 value is one that is “grown for personal consumption or subsistence,” it need not be  
3 commercial in nature. *Id.* A Decree water right holder may not change the use of Decree  
4 water from agricultural to municipal, domestic or industrial without filing a change in use  
5 application with the Commissioner, but such a change may be made if the applicant can  
6 show that it does not result in injury to the rights of other parties to the Decree. *Id.* at  
7 1478.

8 All ten of Freeport’s Applications state that the proposed purpose of use of the  
9 Decree water after the transfer is irrigation. For Application 133, Freeport’s witnesses  
10 testified that Revised Transfer Parcel 1 is to be used as grazing land. (*See Attach. 17.*)  
11 Because the vegetation cultivated on the land is to be fed to livestock, which in turn may  
12 be for personal consumption, the Court finds that the cultivation of vegetation for grazing  
13 is a crop of value and thus a beneficial agricultural use of Decree water. By contrast, for  
14 Application 166, Freeport’s witnesses testified that the Transfer Parcel is to be used as a  
15 habitat mitigation site. (*See Attach. 45.*) While there can be little doubt that the creation  
16 and maintenance of natural habitats is important, the Court cannot construe crops of value  
17 to include habitat mitigation. For such a proposed use of Decree water, Freeport must file  
18 a change in use application that identifies the proposed purpose of water use as habitat  
19 mitigation, not irrigation. Application 166 therefore fails.

20 In several of Freeport’s Applications, a part of the Transfer Parcel is road, canal or  
21 ditch. For example, Revised Transfer Parcel 151 is 5.94 acres, and the Objecting Parties  
22 point out that 1.71 acres of the parcel are road and river bottom. (*See Attach. 37.*) The  
23 transfer of a Decree water right to land that is road, canal or ditch does not result in a  
24 beneficial agricultural use of the water unless Freeport can show that crops of value will  
25 be grown on the land that is now road, canal or ditch. Without such a showing, a transfer  
26 of a Decree water right to land that is road, canal or ditch is not permitted.

27  
28

1 Finally, a Decree water right may not be transferred to a parcel of land that already  
 2 has a Decree water right. For example, in Freeport's Application 133, Transfer Parcels 1  
 3 and 2 already have Decree water rights. (*See* Attachs. 15 & 16.) As a result, these  
 4 transfers fail.

### 5 3. No Injury to the Rights of Other Parties Under the Decree

6 Pursuant to Article XI of the Decree, the Change in Use Rule states that "the  
 7 applicant shall have the burden of establishing a prima facie case of no injury to the rights  
 8 of other parties under the Gila Decree" resulting from the severance and transfer of a  
 9 Decree water right. (Change in Use Rule, § IV(4)(B).) Related to that requirement, the  
 10 Application Form asks the applicant to explain how the proposed change to the Decree  
 11 water right will affect other Decree water right holders.<sup>35</sup> (Application Form, Question  
 12 26.) Upon the applicant's prima facie showing of no injury, the burden of proof shifts to  
 13 the objecting party to show that injury will result from the proposed changed to the  
 14 Decree water right.<sup>36</sup> (Change in Use Rule, § IV(4)(B).) However, because the Decree  
 15 was a final adjudication of the rights to Gila River surface water, (*see* Decree Art. XIII, at  
 16 113), allegations by an objecting party of injury resulting from a water right transfer may  
 17 not be so general as to constitute a collateral attack on the Decree. *See United States v.*  
 18 *Alpine Land & Reservoir Co.* ("Alpine II"), 878 F.2d 1217, 1224 (9th Cir. 1989) (holding  
 19 that the tribe's allegation that proposed water right transfers could deplete the water  
 20 available for indigenous fish amounted to an improper collateral attack on the decree  
 21

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22  
 23 <sup>35</sup> The Application Form also gives the applicant the opportunity to "[p]rovide any additional  
 24 information to explain the proposed transfer." (Application Form, Question 27.)

25 <sup>36</sup> The Court notes the distinction between an instance in which a prior appropriator seeks  
 26 injunctive relief against an impairment of its water right by a junior appropriator, where the  
 27 prior appropriator has the burden of proof, and an instance in which a Decree water right  
 28 holder applying to transfer a water right seeks to show no injury to other Decree parties as  
 a result of a proposed transfer, where the applicant has the burden of proof. *Compare Gila  
 Valley Irrigation Dist.*, 920 F. Supp. at 1448, *with* Change in Use Rule, § IV(4)(B).

1 because the parties to the Decree necessarily weighed this interest in entering into the  
2 Decree in the first place).

3 In an effort to meet its burden of establishing a prima facie case in its  
4 Applications, Freeport provided the following assessment of the effect of each water right  
5 transfer on other Decree water right holders:

6 All that will be changed as a result of this application will be the location of  
7 decreed rights and associated point of diversion under the Globe Equity No.  
8 59 Decree. The priorities, volumes of water use and acreage will not  
change. There will be no net increase or decrease in decreed rights as a  
result of this proposed severance and transfer.

9 (Application Form, Question 26.) Freeport simply argues that, because water right  
10 priorities, volumes and acreage do not change as a result of its Applications, the  
11 Applications do not cause any injury to the rights of other parties to the Decree. In  
12 essence, Freeport contends that a change to the location of use of a Decree water right or  
13 the point or type of diversion are immaterial to the injury inquiry, so long as the water  
14 right priorities, volumes and acreage remain unchanged. In the evidentiary hearing,  
15 Freeport provided expert testimony regarding potential injury to other Decree parties only  
16 in rebuttal to the Tribe's evidence that the location of use and point and type of diversion  
17 matter and that Freeport's proposed changes have the potential to cause injury to the  
18 Tribe's rights. Because Freeport did not provide any evidence in its case in chief, the  
19 Tribe moved for Judgment as a Matter of Law, asserting that Freeport failed to meet its  
20 burden of establishing a prima facie case of no injury to other Decree parties. (See Doc.  
21 110.)

22 The Court agrees that the prima facie evidence Freeport provided of no injury to  
23 other Decree parties is insufficient, and the Court therefore grants the Tribe's Motion for  
24 Judgment as a Matter of Law. "Prima facie evidence" is evidence that is "[s]ufficient to  
25 establish a fact or raise a presumption unless disproved or rebutted." *Black's Law*  
26 *Dictionary* 1310 (9th ed. 2009). Freeport contends that the Decree's priority system  
27 ensures that no party can be injured as a result of a water right transfer; indeed, a Decree  
28



1 water right holder may not transfer more water than it has a right to use, and the priority  
2 of the water right remains unchanged after a transfer. However, as both the experts from  
3 Freeport and the Tribe pointed out, this interpretation does not take into account the  
4 realities of irrigation or the geography of the Gila watershed. Freeport's interpretation  
5 would also render the Change in Use Rule's requirement for prima facie evidence of no  
6 injury to other Decree parties meaningless. The injury inquiry is not simply whether,  
7 through its proposed transfer, a change-in-use applicant puts the same amount of water to  
8 beneficial use with the same priority as the Decree allows. Rather, the inquiry is what  
9 effect the proposed transfer will have on other Decree water right holders in terms of the  
10 quantity and quality of water left in the river after the applicant's proposed new use. The  
11 evidence Freeport proffered in its case in chief did not address the latter inquiry and was  
12 therefore insufficient.

13 On the subject of potential injury to a prior appropriator, the Court has cited the  
14 following guidance from the United States Supreme Court in the past:

15 "What diminution of quantity, or deterioration of quality, will constitute an  
16 invasion of the rights of the first appropriator will depend on the special  
17 circumstances of each case, considered with reference to the uses to which  
18 the water is applied. A slight deterioration in quality might render the water  
19 unfit for drink or domestic purposes, whilst it would not sensibly impair its  
20 value for mining or irrigation. In all controversies, therefore, between him  
21 and parties subsequently claiming the water, the question for determination  
22 is necessarily whether his use and enjoyment of the water to the extent of  
23 his original appropriation have been impaired by the acts of the [junior  
24 appropriator]."

25 *Gila Valley Irrigation Dist.*, 920 F. Supp. at 1448 (quoting *Atchison v. Peterson*, 87 U.S.  
26 507, 514-15 (1874)). Freeport's Applications raise potential issues of water quality  
27 deterioration and water quantity diminution. In addition, Freeport's Applications present  
28 the unusual circumstance of transferring multiple Decree water rights at the same time,  
raising the issue of the cumulative impacts of the water right transfers.

With respect to water quality, the Court imposed an injunction on Decree water  
right holders to maintain minimum water quality standards in 1996. (Case No. CV 31-  
0059-TUC-SRB, Docs. 4522, 4523, Water Quality Injunction and related Order.) The

1 Court gave the Commissioner the responsibility of monitoring the quality of the Gila  
 2 River water and directed him to ensure that the Tribe receives a specified minimum  
 3 quality of water.<sup>37</sup> Here, to show no injury to other Decree parties, Freeport must at least  
 4 provide evidence that its proposed transfers do not result in a deterioration of the water  
 5 quality to the point that the requirements of the Court's water quality injunction cannot be  
 6 met.<sup>38</sup>

7 With respect to a potential diminution of water quantity, Freeport must "establish  
 8 by a preponderance of evidence that no action of [Freeport's] diminished the water which  
 9 arrived at the point of diversion of the lower senior appropriator." *Zannaras v. Bagdad*  
 10 *Copper Corp.*, 260 F.2d 575, 577 (9th Cir. 1958). Based on the expert testimony, a water  
 11 right transfer may result in a diminution of water quantity through (1) a significant  
 12 decrease of return flow of Gila River water, or (2) an exacerbation of the Cosper's  
 13 Crossing condition, or (3) a time-lagged depletive effect on the surface stream resulting  
 14 from pumping as a method of diversion. Freeport's prima facie evidence of no injury to  
 15 other Decree parties must at least address these issues insofar as they apply.

16 **a. Return Flow**

17 The Court has noted that

18 [t]he Gila River once supported irrigation from its surface flow in regions  
 19 extending from above the New Mexico border to the confluence of the Gila

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20 <sup>37</sup> In a preliminary analysis, the Court noted that the Tribe's Decree water right was to the  
 21 natural flow of the Gila River, and natural flow is not the same as irrigation return flow,  
 22 which is inferior due to its increased salinity. *United States v. Gila Valley Irrigation Dist.*,  
 23 804 F. Supp. 1, 7 (D. Ariz. 1992). The Court therefore stated that the Tribe's water right  
 24 must be allowed to pass through the Upper Valley undiverted. *Id.* In imposing the Water  
 25 Quality Injunction, the Court suspended this requirement but directed the Commissioner to  
 26 ensure that the water delivered to the Tribe meets the water quality requirements set forth in  
 the Injunction. (Case No. CV 31-0059-TUC-SRB, Doc. 4522, Order on Water Quality  
 Injunction and Related Matters, at 3.)

27 <sup>38</sup> The Court recognizes that there was some testimony at the evidentiary hearing that the  
 28 requirements of the Court's water quality injunction are difficult to meet presently, but this  
 testimony was not supported by other evidence.



1 and the Salt River. The river is now overdeveloped and over allocated. In  
2 the upper valleys, surface flow is heavily augmented with water pumped  
3 from wells. Further, the growers in the upper valleys on occasion divert the  
4 entire flow of the stream into irrigation canals to serve the acreage they  
5 farm. The return flows from diversions are often recycled, diverted again  
6 and applied to other fields.

7 *Gila Valley Irrigation Dist.*, 920 F. Supp. at 1448. It follows that, as the return flow—the  
8 water that is not consumed during a diversion but returned to the river—decreases, the  
9 water in the river available for other water right holders to divert decreases. Thus a  
10 change to the place of diversion or use of a Decree water right that causes a significant  
11 decrease in return flow can injure other Decree water right holders.

12 For example, if the distance from the proposed diversion point to the proposed  
13 place of use is much greater than the distance from the existing diversion point to the  
14 existing place of use, then more water will be lost by evaporation in transport, thereby  
15 decreasing the return flow from the proposed water use. If the soil at the proposed place  
16 of use causes greater consumptive use of water, or the proposed ditch is less water  
17 efficient than the existing ditch, then the return flow also decreases. Likewise, if a  
18 portion of the proposed ditch flows outside the Gila subflow zone, then a portion of the  
19 return flow does not end up in the Gila River for use by other Decree water right  
20 holders.<sup>39</sup> Combining all of these factors may result in a significant decrease in return  
21 flow.

22 An applicant has the burden to compare the relevant facts regarding the existing  
23 place of diversion and use and the proposed place of diversion and use to assess whether  
24 there will be a significant decrease in return flow to the Gila River at the proposed place  
25 of use. For example, the applicant can compare ditch distance, ditch location, ditch type,

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26 <sup>39</sup> The Court would be especially concerned with an instance where a portion of the Transfer  
27 Parcel or a portion of the proposed ditch are located outside the Gila subflow zone such that  
28 a portion of the return flow would not end up in the Gila River. This type of use would  
violate in part the doctrine of beneficial use of a Decree water right.

1 and soil type between the existing place of use and the proposed place of use.<sup>40</sup> Freeport  
 2 provided no such evidence in its case in chief and only generalized, conclusory statements  
 3 in rebuttal to the Tribe's evidence of potential injury. Because the Court was unable to  
 4 determine on an Application by Application basis whether any significant decreases in  
 5 return flow result from Freeport's Applications, Freeport did not meet its burden to show  
 6 no injury to the rights of other Decree water right holders. *See Zannaras*, 260 F.2d at 577  
 7 ("[I]t would be fantastic to insist that the senior appropriator [i.e. the Tribe] . . . has the  
 8 burden of proof to show that the diversion of [the junior appropriator, i.e. Freeport] did  
 9 not diminish the flow of water during the critical months. The junior appropriator . . .  
 10 must establish by a preponderance of evidence that no action of his diminished the water  
 11 which arrived at the point of diversion of the lower senior appropriator.")

12 **b. Cospers Crossing**

13 The Cospers Crossing condition is unique to the Gila River. The Commissioner  
 14 allows the entire surface flow of the Gila River to be diverted upstream of Cospers  
 15 Crossing in disregard of the senior rights to apportioned water downstream when  
 16  
 17  
 18

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19 <sup>40</sup> The Objecting Parties assert that the historic use of the existing water right must be  
 20 considered in the injury analysis, and the proposed new water use should be compared to the  
 21 historic use. Because many of Freeport's Applications concern parcels that have not been  
 22 irrigated for 25 years or more, the Objecting Parties in essence assert that *any* use of those  
 23 water rights now results in injury to other Decree parties through a significant decrease in the  
 24 amount of Gila River water available to other Decree parties, and the Applications must  
 25 therefore be denied. But such a conclusion would essentially mean that Freeport had  
 26 abandoned the water rights in question without a showing that they had intended to do so.  
 27 And such a conclusion would lead to an absurd result: even though the Court had concluded  
 28 that Freeport had not abandoned a certain water right it had not used for a period of time, if  
 Freeport tried to use that water right on the *existing* place of use, that use could be considered  
 improper because it would deplete the flow of the Gila River as compared to the flow based  
 on Freeport's historic non-use of the water. The Court does not go so far. But Freeport must  
 provide some evidence to show that applying Decree water at the proposed place of use does  
 not result in significant return flow losses over the existing place of use.

1 Cospers Crossing is Dry as determined by the Commissioner.<sup>41</sup> *Gila Valley Irrigation*  
2 *Dist.*, 920 F. Supp. at 1462-63. It follows that, the longer Cospers Crossing is Dry, the  
3 longer a downstream senior right holder may suffer a lack of water. Thus, a water right  
4 transfer that exacerbates the Cospers Crossing condition by increasing the period of time  
5 that Cospers Crossing is Dry may result in injury to downstream senior right holders.

6 As the Court has noted, any transfer of a water right from below Cospers Crossing  
7 to above Cospers Crossing, whether a surface flow diversion or a subflow diversion,  
8 decreases the amount of water available at Cospers Crossing. Unless the apportionment  
9 water right holders make a change to the Cospers Crossing agreement, an applicant  
10 proposing such a transfer has the burden to show that the resulting stream depletion will  
11 not cause Cospers Crossing to be Dry for such a period of time that downstream senior  
12 right holders are injured. For Applications 122, 151 and 162, Freeport offered no relevant  
13 evidence in its case in chief and, in rebuttal, offered only the general conclusion that these  
14 Applications will not result in a net decrease in the amount of water available in the  
15 "Upper Gila River basin." Freeport's Applications 122, 151 and 162 did not address the  
16 effect of the stream depletion at Cospers Crossing as a result of the addition of  
17 diversions above Cospers Crossing.

18 **c. Diversion by Pumping**

19 Pursuant to the Decree, the Court has jurisdiction over the waters of the Gila  
20 River. (Decree at 113.) Those waters include the surface waters and "subflow," which  
21 under Arizona law is defined as "'those waters which slowly find their way through the  
22 sand and gravel constituting the bed of the stream, or the lands under or immediately  
23 adjacent to the stream, and are themselves a part of the surface stream.'" *In re the Gen.*

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24  
25 <sup>41</sup> This practice is the result of an agreement among apportionment water right holders and  
26 is authorized by the Decree. *Gila Valley Irrigation Dist.*, 920 F. Supp. at 1464-65. However,  
27 no apportionment right may be taken in disregard of the Tribe's priority right to 6,000 acre-  
28 feet of water. *Id.* at 1459. Thus, the Commissioner may not authorize the Franklin Irrigation  
District to divert the entire flow of the stream under a Dry Cospers Crossing condition in  
disregard of a prior call by the Tribe. *Id.* at 1465.

1 *Adjudication of All Rights to Use Water in the Gila River Sys. & Source* (“*Gila River*  
 2 *IV*”), 9 P.3d 1069, 1073 (Ariz. 2000) (quoting *Maricopa Cnty. Mun. Water Conservation*  
 3 *Dist. No. 1 v. Sw. Cotton Co.*, 4 P.2d 369, 380 (Ariz. 1931)). Arizona courts have noted  
 4 that “[t]he notation of ‘subflow’ is significant in Arizona law, for it serves to mark a  
 5 zone where water pumped from a well so appreciably diminishes the surface flow of a  
 6 stream that it should be governed by the same law that governs the stream.” *Id.* (quoting  
 7 *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*,  
 8 989 P.2d 739, 739 (Ariz. 1999)). This Court has already ruled that pumping subflow of  
 9 the Gila River, like diverting surface flow, requires a Decree water right. (Case No. CV  
 10 31-0059-TUC-SRB, Doc. 6383, Mar. 29, 2005 Order at 7-8.)

11 The use of a well to pump subflow of the Gila River without an associated Decree  
 12 water right is a violation of the Decree.<sup>42</sup> To be clear, pursuant to the Court’s jurisdiction  
 13 over the flow of the Gila River, the Commissioner does have the authority to shut off a  
 14 well that is pumping subflow of the Gila River without an associated Decree water right.  
 15 If the Commissioner knows that an individual or entity is pumping subflow of the Gila  
 16 River without an associated Decree water right, and the individual or entity has not filed

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17  
 18 <sup>42</sup> Arizona has not recognized the hydraulic connection between surface water and  
 19 percolating groundwater, and therefore, under Arizona law, “percolating groundwater is not  
 20 appropriable and may be pumped by the overlying landowner, subject to the doctrine of  
 21 reasonable use and the federal reserved water rights doctrine.” *Gila River IV*, 9 P.3d at 1073  
 22 (citations omitted). But in a recent case involving the rights to Nevada’s Truckee River  
 23 water under the Orr Ditch Decree, the Ninth Circuit Court of Appeals concluded that the  
 24 decree “forbids groundwater allocations that adversely affect the Tribe’s decreed rights to  
 25 water flows in the river,” even though that decree contains no language protecting the Paiute  
 26 Tribe’s water rights from diminution of flow resulting from groundwater allocations. *United*  
 27 *States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1154, 1158 (9th Cir. 2010). The court looked  
 28 to federal case law to recognize that “[s]urface water contributes to groundwater, and  
 groundwater contributes to surface water,” and that the “reciprocal hydraulic connection  
 between groundwater and surface water has been known to both the legal and professional  
 communities for many years.” *Id.* at 1158. The court thus concluded that, as a result of its  
 jurisdiction over the decree, the district court has jurisdiction over groundwater allocations  
 under Nevada state law that adversely affect the Paiute Tribe’s decree water rights. *Id.* at  
 1161.

1 an application to transfer a Decree water right to cover the subflow pumping, the  
2 Commissioner is directed to request that the Court issue an Order to Show Cause why the  
3 pumping should not be stopped until the individual or entity obtains an associated Decree  
4 water right.

5 In Applications 122, 151 and 162, Freeport proposes to change the diversion  
6 method for certain Decree water rights from a canal at ground level to a well below  
7 ground. By applying for a Decree right for water pumped from a well, Freeport concedes  
8 that the water is subflow of the Gila River for which a Decree right is required, a  
9 proposition that was confirmed by the expert testimony at the evidentiary hearing. The  
10 use of water pumped from a well is new to the administration of the Decree. It presents  
11 issues regarding how the Commissioner will monitor the flow rates and volumes of water  
12 diverted to ensure that Decree limits are not exceeded. While it is not Freeport's burden  
13 to address these issues in its Applications, it is the Court's hope that the parties involved  
14 will work together using their expertise to address these issues so that the Commissioner  
15 may enforce the Decree with an appropriate level of accountability and documentation  
16 regarding the diversion of Decree water through wells. The use of wells as a method of  
17 diversion must not be so difficult for the Commissioner to monitor that more water may  
18 unknowingly be diverted than the Decree allows.

19 The experts for both Freeport and the Tribe testified to the potential time-lagged  
20 depletive effect on the surface flow of the Gila River resulting from well diversions. This  
21 is particularly relevant as it pertains to the Cosper's Crossing condition. The addition of  
22 diversions by wells above Cosper's Crossing may cause Cosper's Crossing to become  
23 Dry at a later time, which may upset the expectations of downstream water users so long  
24 as the Cosper's Crossing agreement is in place among apportionment water right holders.  
25 In proposing to add wells above Cosper's Crossing in Applications 122, 151 and 162,  
26 Freeport must address whether Cosper's Crossing will become Dry at a later time and, if  
27 so, whether this change will have a harmful effect on downstream Decree right holders.  
28

**d. Cumulative Impacts**

Freeport currently has 52 Applications to sever and transfer decree water rights pending before this Court. Freeport filed its Applications all at once, within six months of the enforceability date of the UV Forbearance Agreement and in reliance on a provision in that Agreement that stated that the Community, SCIDD and the United States would “not object to any application filed by an owner of Hot Lands” in a manner consistent with the Change in Use Rule. (UV Forbearance Agreement at 93.) The simultaneous transfer of multiple Decree water rights is an unusual circumstance, and it raises the issue of the cumulative impacts of the water right transfers. It cannot be denied that, while a single water right transfer may have small impacts, the cumulative impacts of multiple water right transfers may be significant.

In a case addressing whether a proposed change to a mineral exploration project violates the National Environmental Policy Act (“NEPA”) by, among other things, adversely affecting the water supply, the Ninth Circuit Court of Appeals concluded that the BLM’s approval of the project was improper because it failed to take into account the cumulative impact of multiple actions. *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, — F.3d —, Case No. 07-16336, 2010 WL 2431001, at \*7-11 (9th Cir. June 18, 2010) (citing *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 994 (9th Cir. 2004) (“Sometimes the total impact from a set of actions may be greater than the sum of the parts . . . .[T]he addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact.”)). While the case before this Court does not arise under NEPA, the rationale behind requiring a cumulative impact analysis here is the same.

Considering Freeport’s filing of multiple Applications for the severance and transfer of Decree water rights simultaneously, Freeport must provide evidence that the cumulative impacts of the proposed transfers do not cause injury to other water right holders as required by the Decree. This evidence must contain quantified and detailed



1 information, and not simply conclusory statements regarding possible effects and risks.  
2 *See Te-Moak Tribe*, 2010 WL 2431001, at \*8.

3 **D. The Application Form**

4 The Objecting Parties raised issues regarding the Application Form and Freeport's  
5 responses to Application Form questions. To address those issues, the Court provides the  
6 following guidance on the completion of the Application Form.

7 **1. Tax Parcel Numbers**

8 The cover sheet of the Application Form requests that the applicant provide the  
9 Identification Tax Parcel numbers (a/k/a Assessor Parcel Numbers, or APNs). Freeport  
10 did not provide this information in their Applications, and the Objecting Parties objected.  
11 The Change In Use Rule states that "[t]he application shall be in such form as prescribed  
12 by the Commissioner." (Change in Use Rule, § IV(1)(C).) APNs are useful to other  
13 Decree parties to identify the location and ownership of the Sever Parcel and Transfer  
14 Parcel at issue in an application. Applicants are therefore required to provide these  
15 APNs. The Community Database contains this information and will prove useful in this  
16 respect once it is available.

17 **2. Proof of Ownership of Water Right and Conveyance Document**

18 Question 5 of the Application Form requires that the applicant attest to its  
19 ownership of the water right being transferred. As the Court has noted in the past, the  
20 Court does not require proof of ownership of the water right being transferred in an  
21 application, but Decree parties may object to an application on the grounds that the  
22 applicant does not own the water right. (Case No. CV 31-0059-TUC-SRB, Doc. 7295,  
23 Order at 7.)

24 The Objecting Parties assert that Arizona law requires that a water right be  
25 conveyed by deed. *See Neal v. Hunt*, 541 P.2d 559, 562 (Ariz. 1975). They therefore  
26 recommend that the Court require that all applicants provide a conveyance document for  
27 the Decree water right being transferred that the Commissioner may then record. It is not  
28

1 clear to the Court that every transfer of a Decree water right requires a deed. In any case,  
 2 while a conveyance document may be collateral to a transfer application, the Court does  
 3 not require that a conveyance document be submitted with an application.

### 4 **3. The Legal Descriptions of the Existing and Proposed Diversion Points**

5 Questions 10 and 17 of the Application Form require that the applicant provide a  
 6 legal description and map or survey of the existing and proposed diversion points. In all  
 7 ten of its Applications, Freeport identified the diversion points only to the quarter-quarter  
 8 section, and the “map” of each diversion point that Freeport provided was simply a square  
 9 representing the quarter-quarter section. This includes Applications 122, 151 and 162,  
 10 which propose the use of wells as the diversion method on the Transfer Parcels. The  
 11 Objecting Parties argue that identifying the diversion points with a legal description of an  
 12 entire quarter-quarter section and no actual map is insufficient, and the Court agrees. In  
 13 an application that requests a change to the diversion point, the Change in Use Rule  
 14 requires a legal description and map or survey of the existing and proposed diversion  
 15 points. (Change in Use Rule, §§ IV(1)(C)(2) & (3); *see also* Application Form, Questions  
 16 10 & 17.) Freeport’s Applications therefore did not meet the requirements of the Change  
 17 in Use Rule in identifying the diversion point locations.

### 18 **4. The Legal Descriptions of the Sever and Transfer Parcels**

19 Questions 11 and 18 of the Application Form require that the applicant provide a  
 20 legal description and map or survey of the Sever and Transfer Parcels. Along with its  
 21 legal descriptions for the Sever Parcels, Freeport stated that the information it provided  
 22 “describes the approximate total size and location of the water right” and that the water  
 23 right “is appurtenant to lands in the township, range, section, and subdivision as described  
 24 in the Globe Equity Decree.” Freeport further stated that the descriptions of the Transfer  
 25 Parcels represented the “initial intended location, but future locations may change in  
 26 accordance with the Globe Equity Decree.” Freeport continued, “If the application is  
 27 granted, the new water right will be added to the Applicant’s existing water rights in the  
 28



1 same quarter-quarter section as described in the Globe Equity Decree, if any, and the  
2 transferred water right will be used within that township, range, section, and subdivision  
3 as described in the Globe Equity Decree and in compliance with the Globe Equity  
4 Decree.” In essence, Freeport stated in its Applications that its Decree water rights may  
5 be moved around, or “float,” within a 40 acre quarter-quarter section. The Objecting  
6 Parties disagreed.

7 As the Court has already noted, an Article V Decree water right belonging to a UV  
8 Defendant is appurtenant to the specific tract of land through the irrigation of which the  
9 right was acquired. (See Case No. CV 31-0059-TUC-SRB, Docs. 7295 & 7353, Orders.)  
10 The location of use of an Article V Decree water right may not be changed without an  
11 approved application pursuant to the Change in Use Rule. Freeport may not, for example,  
12 add a transferred water right to an existing water right in a certain quarter-quarter section  
13 and then proceed to use the total water right anywhere in the quarter-quarter section.  
14 Each water right is appurtenant to a specific tract of land, and the legal description and  
15 map or survey provided by the applicant on the Application Form must describe that  
16 specific tract of land. Freeport’s statements in response to Questions 11 and 18 were  
17 therefore improper.

18 The Change in Use Rule provides that “[a] separate application must be filed for  
19 each water right affected by the proposed change or changes.” (Change in Use Rule, §  
20 IV(1)(E).) In Application 151, Freeport provides legal descriptions for two Sever Parcels  
21 and two Transfer Parcels. Sever and Transfer Parcel 1 each contain 10.4 acres of land.  
22 Sever and Transfer Parcel 2 each contain 4.0 acres of land. The Objecting Parties  
23 contended that Freeport should have submitted two separate applications, and the Court  
24 agrees. The Change in Use Rule is clear: *each* water right affected by the proposed  
25 change or changes requires a *separate* application.

26 The Objecting Parties also pointed out that, when plotting the legal descriptions  
27 provided by Freeport, a parcel from one application overlapped a parcel from another  
28

1 application in several instances. For example, Sever Parcel 1 for Application 151  
 2 overlaps the Sever Parcel for Application 162 by 0.2 acre. (*See* Attachs. 33 & 38.) In  
 3 such an instance, the Court cannot correct the legal descriptions or redline the maps to  
 4 eliminate the overlap, much less make a corresponding adjustment to the Transfer  
 5 Parcels. Both applications must therefore fail.

### 6 **5. The Description of the Historical Use of the Water Right**

7 Question 14 of the Application Form requires that the applicant describe the  
 8 historical use of the water right for the last ten years. In all ten of its Applications,  
 9 Freeport responded that the water right “is not currently practicable and has not been  
 10 practicable” for the last ten years. The Objecting Parties pointed out that this is not true  
 11 for all of the Applications. For example, the Sever Parcel for Application 133 was  
 12 irrigated until 2003. As the Court noted above, the Court agrees that Freeport’s response  
 13 to Question 14 for Application 133 is not supported by the evidence.

14 Question 14 relates to the forfeiture and abandonment inquiries. A response to  
 15 Question 14 such as Freeport’s provides evidence of non-use of the water right for a  
 16 prolonged period, supporting findings of forfeiture (where applicable) or abandonment.  
 17 Freeport’s response worked against its interests in Application 133, but the evidence  
 18 showed that Freeport’s response was incorrect. An error in responding to Question 14 is  
 19 grounds for denying an application if the error is material to the determination of whether  
 20 an applicant has a valid water right to transfer. For example, if the applicant had not  
 21 beneficially used the water right being transferred for ten years, but responded to  
 22 Question 14 that it had, that response is grounds to deny the Application.<sup>43</sup>

### 23 **E. Application Amendments and Freeport’s Revised Legal Descriptions**

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25 <sup>43</sup> The Court notes that the Change in Use Rule provides that “[t]he Commissioner is not  
 26 authorized to make any determination as to whether a water right has or has not been  
 27 abandoned or forfeited.” (Change in Use Rule, § IV(1)(H)(2).) But if the Commissioner is  
 28 aware that an applicant’s water right has not been beneficially used for ten years, yet the  
 applicant avers in the application that it has, the Commissioner may deny the application.

1       The Change in Use Rule does not address whether or how applicants may make  
2 amendments to applications that have already been published by the Commissioner.<sup>44</sup>  
3 After the Commissioner had published the ten Freeport Applications under consideration  
4 and the Objecting Parties had made objections to them and had begun discovery in  
5 preparation for the evidentiary hearing, Freeport provided the Objecting Parties with legal  
6 descriptions of the Sever and Transfer parcels that were different from the legal  
7 descriptions Freeport had provided in its ten Applications. The Objecting Parties  
8 contended that these revisions were significant and required Freeport to submit new  
9 Applications to the Commissioner. The Court could not conclude that Freeport's  
10 revisions constituted material changes to its Applications based on the evidence provided  
11 at that time. The Court conducted the evidentiary hearing as originally scheduled, and  
12 Freeport provided evidence regarding both its original legal descriptions and its revised  
13 legal descriptions in the hearing.

14       The application for a change in the point of diversion or the place, means, manner  
15 or purpose of use of a Decree water right provides notice to the Commissioner, other  
16 Decree parties and the Court of the applicant's request, and the Commissioner, the parties  
17 and the Court depend on the accuracy of the information provided in the application.  
18 Indeed, the Change in Use Rule requires that "[t]he applicant shall state under oath that  
19 the information contained in the application is true and correct, to the best of the  
20 applicant's knowledge at the time of filing." (Change in Use Rule, § IV(1)(F).)  
21 Applications proceed through a review and approval process as detailed in the Change in  
22 Use Rule, and any material change to an application upsets that process. Therefore, an  
23 applicant may not make a material change to an application once the Commissioner has  
24 published the application for review by other Decree parties.

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26 <sup>44</sup> The Change in Use Rule does provide that, in the case that the "Commissioner denies an  
27 application because the applicant has failed to comply with any provision of these rules, the  
28 applicant may file another application with the Commissioner which complies with these  
rules." (Change in Use Rule, § IV(1)(J).)

1 An amendment to the original application may only be made in the instance where  
 2 the change is minor. A minor change is any change that is not substantial or material; in  
 3 other words, a minor change would not upset the review of the application by other  
 4 Decree parties, the Commissioner or the Court. While a change does not have to create a  
 5 defect in the application to be considered material, any change that does create a defect is  
 6 material. If an applicant wishes to make a minor change to an application, the applicant  
 7 may amend the application and file it with the Commissioner and the Court. If an  
 8 applicant wishes to make a substantial or material change to an application once the  
 9 application has been published for review by other parties, the applicant must withdraw  
 10 the original application and file a new application with the Commissioner that will  
 11 proceed from the beginning through the review process pursuant to the Change in Use  
 12 Rule.<sup>45</sup>

13 The changes Freeport made to the legal descriptions of its Sever and Transfer  
 14 Parcels were material changes to its Applications. For example, many of the revised legal  
 15 descriptions set forth completely different locations than the original legal descriptions.<sup>46</sup>  
 16 (*E.g., compare* Transfer Parcel 115 (Attach. 3) *with* Revised Transfer Parcel 115 (Attach.  
 17 4).) Some revised legal descriptions changed the number of acres of land involved in the  
 18 water rights transfer. (*E.g., compare* Sever Parcel 162 (Attach. 38) *with* Revised Sever  
 19

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20 <sup>45</sup> Many applications were filed within the six month period following the Enforceability  
 21 Date of the UV Forbearance Agreement to try to avoid objections from SCIDD, the  
 22 Community and the United States on behalf of the Community. If material changes are now  
 23 made to those applications, requiring the submittal of new applications, the Court sees no  
 24 compelling reason for the new applications to relate back to the filing date of the original  
 25 applications. Even for applications filed within that six month window, the Tribe and the  
 United States on behalf of the Tribe were able to, and did, object, because they were not  
 subject to the restrictions of the UV Forbearance Agreement.

26 <sup>46</sup> A change in the locations of the Transfer Parcels may cause a corresponding change in the  
 27 proposed points or methods of diversion, among other things, and those corresponding  
 28 changes must be made to the application. (*E.g., compare* Transfer Parcels 151-1 & -2  
 (Attachs. 35 & 36) *with* Revised Transfer Parcel 151 (Attach. 37).)

1 Parcel 162 (Attach. 39).) In some instances, Freeport changed from multiple Sever or  
2 Transfer Parcels to just one in its revised legal descriptions. (*E.g., compare* Transfer  
3 Parcels 162-1, -2 & -3 (Attachs. 40 & 41) *with* Revised Transfer Parcel 162 (Attach. 42).)  
4 Almost all of the revised legal descriptions made significant changes to the shape of the  
5 Sever and/or Transfer Parcels. (*E.g., compare* Sever Parcel 122 (Attach. 9) *with* Revised  
6 Sever Parcel 122 (Attach. 10).) Each of these changes constitutes a material change that  
7 requires a new application. In reviewing the maps of Freeport's revised legal  
8 descriptions, it is readily apparent that the revisions Freeport made are material changes  
9 to each and every one of Freeport's ten Applications, obviating the need for the Court to  
10 provide an Application by Application analysis here.

11 Among Freeport's Applications, the only example of a change to a legal  
12 description that the Court would consider minor is that for Transfer Parcel 166. While  
13 Revised Transfer Parcel 166 was a slight change in shape and location from Transfer  
14 Parcel 166, the quantity, character, and general location of the acreage remained the same.  
15 (*Compare* Attach. 45 *with* Attach. 46.) Moreover, the revised legal description did not  
16 create an application defect that was not present previously. The Court would find that  
17 the original legal description provided sufficient notice to parties of the intended Transfer  
18 Parcel 166, and that Revised Transfer Parcel 166 was a minor change. However, the  
19 change to the legal description for Sever Parcel 166 was a material change, and therefore  
20 Freeport materially changed Application 166, requiring the submittal of a new  
21 application. Moreover, even if the changes Freeport made to its legal descriptions had  
22 been minor, Freeport never filed the changes as application amendments with the  
23 Commissioner or the Court. Thus, none of Freeport's revised legal descriptions is  
24 properly before the Court.<sup>47</sup>

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27 <sup>47</sup> In this Order, the Court analyzes Freeport's revised legal descriptions as test cases only.  
28 The Court also notes that, even if the revised legal descriptions were properly before the  
Court, each of the Applications would still have been denied for numerous reasons.

**F. The Propriety of the Community's Objections under the UV Forbearance Agreement**

The UV Forbearance Agreement states that the UV Defendants could transfer Decree water rights from Sever Parcels to Hot Lands that they own. (UV Forbearance Agreement at 93, § 11.) Section 11 provides, in relevant part:

11.1 No later than six (6) months after the Enforceability Date, the owners of Hot Lands may file an application for severance and transfer of UV Decreed Water Rights to the Hot Lands they own. Such application shall be in compliance with all the applicable requirements of section IV of the order of the Globe Equity Enforcement Court filed on or about September 30, 1993 [Change in Use Rule]. Such owners shall use their best efforts to pursue such application and accomplish such severance and transfer.

11.2 The Community, the San Carlos Irrigation and Drainage District and the United States shall not object to any application filed by an owner of Hot Lands in a manner consistent with the terms of Subparagraph 11.1.

(*Id.*) If a Transfer Parcel (1) already has a Decree water right, or (2) was not irrigated between 1997 and 2001, or (3) lies outside the UV Impact Zone, it is not Hot Lands. (*Id.* at 7, ¶ 2.15.)

Freeport filed its ten Applications within six months of the Enforceability Date, yet the Community still objected to all ten Applications, notwithstanding the terms of the UV Forbearance Agreement. Freeport asserts that the Community's objections were improper and should not be considered by the Court.

In the Court's interpretation of the language of section 11 of the UV Forbearance Agreement, the Community agreed not to object to any application that was filed by an owner of Hot Lands and that complied with the requirements of the Change in Use Rule. Thus, with regard to the Hot Lands requirement, if an application's Transfer Parcel already had a Decree water right, or was not irrigated between 1997 and 2001, or lies outside the UV Impact Zone, then the Community was free to object to the application. That was the case for nine of Freeport's ten Applications; only Transfer Parcel 118 lies completely on Hot Lands.

Moreover, the Community could object to applications insofar as they did not comply with the requirements of the Change in Use Rule. As detailed above, Freeport's ten Applications suffered numerous deficiencies in this regard. Notably, the Community did not object to Freeport's Applications on the basis that the Transfer Parcel lies on Hot Lands, or on the basis of injury to other Decree parties as a result of the proposed transfer. The Community's objections to Freeport's ten Applications were therefore proper here. Any allegations that the Community acted in bad faith in making its objections to the ten Freeport Applications are meritless.

### **G. Evaluation of Freeport's Ten Applications**

In consideration of the foregoing, the Court denies all ten of Freeport's Applications. All ten Applications fail to adequately address whether the proposed water right transfers will injure other Decree parties. (*See infra*, § III(C)(3).) All ten Applications fail to identify the relevant Assessor Parcel Numbers. (*See infra*, § III(D)(1).) All ten of the Applications fail to identify the locations of the diversion points with a map and legal description. (*See infra*, § III(D)(3).) And all ten Applications include language indicating that the Decree water right may float within a quarter-quarter section, which is incorrect. (*See infra*, § III(D)(4).) On the other hand, none of the Decree water rights at issue in the ten Applications is subject to Arizona's forfeiture statute. (*See infra*, § III(B)(1).)

Individual Applications also fail for the additional reasons set forth below. The Court notes that, where only a portion of a Sever or Transfer Parcel is improper, the Court denies the entire Application. The Court cannot redline the maps or revise the legal descriptions to correct any deficiencies.

Application 118 (*See* Attach. 5.)

Almost all of the Sever Parcel lies outside the named Decree acreage and has no Decree water right. (*See infra*, § III(C)(1).)

Application 122 (*See* Attachs. 9 & 11.)



1 Of the Sever Parcel, 5.2 acres lie outside the named Decree acreage and have no  
 2 Decree water right. (*See infra*, § III(C)(1).) Of the Transfer Parcel, 0.9 acre already has a  
 3 Decree water right. (*See infra*, § III(C)(2).) The Transfer Parcel also contains 0.8 acre of  
 4 highway, road and ditch, and Freeport does not show that crops of value can be grown on  
 5 this land. (*See id.*)

6 Application 133 (*See* Attachs. 13, 15 & 16.)

7 Of the Sever Parcel, 0.5 acre lies outside the named Decree acreage and has no  
 8 Decree water right. (*See infra*, § III(C)(1).) Transfer Parcels 1 and 2 already have Decree  
 9 water rights. (*See infra*, § III(C)(2).)

10 Application 138 (*See* Attachs. 19 & 21.)

11 Of the Sever Parcel, 0.1 acre lies outside the named Decree acreage and has no  
 12 Decree water right. (*See infra*, § III(C)(1).) The Transfer Parcel contains 1.0 acre of  
 13 road, berm and active river channel, and Freeport does not show that crops of value can  
 14 be grown on this land. (*See infra*, § III(C)(2).)

15 The Court also notes that Freeport's witnesses testified that a portion of Sever  
 16 Parcel 138 is within the irrigation zone of a center pivot arm system of irrigation and it  
 17 would not be easy to leave Sever Parcel 138 unirrigated. The Court hopes that any new  
 18 application regarding this parcel of land takes this condition into account.

19 Furthermore, while it appears that Freeport has abandoned a portion of Sever  
 20 Parcel 138, it is inconclusive how many acres Freeport has abandoned because a portion  
 21 of Freeport's legal description for Sever Parcel 138 lies outside the named Decree acres.<sup>48</sup>

22 Application 147 (*See* Attachs. 23, 25 & 26.)

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 25 <sup>48</sup> Freeport's revised legal descriptions show that Freeport has abandoned portions of its  
 26 Revised Sever Parcels. For example, the facts show that Freeport has abandoned all of  
 27 Revised Sever Parcel 115. (*See infra*, § III(B)(2).) However, because the revised legal  
 28 descriptions are not properly before the Court, the Court does not declare any portions of the  
 Revised Sever Parcels abandoned.

1 Of the Sever Parcel, 0.24 acre lies outside the named Decree acreage. (*See infra*, §  
2 III(C)(1).) Portions of Transfer Parcels 1 and 2 already have Decree water rights. (*See*  
3 *infra*, § III(C)(2).) Transfer Parcel 2 also contains 0.16 acre of highway and road, and  
4 Freeport does not show that crops of value can be grown on this land. (*See id.*)

5 The Court concludes that Freeport has abandoned 1.4 acres of Sever Parcel 147,  
6 the acres that have been covered with road and canal since at least 1991. (*See infra*, §  
7 III(B)(2).)

8 Application 150 (*See* Attachs. 29 & 31.)

9 Of the Sever Parcel, 2.35 acres lie outside the named Decree acreage. (*See infra*, §  
10 III(C)(1).) Most of the Transfer Parcel already has a Decree water right. (*See infra*, §  
11 III(C)(2).) The Transfer Parcel also contains 0.88 acre of canal and road, and Freeport  
12 does not show that crops of value can be grown on this land. (*See id.*)

13 While it appears that Freeport has abandoned a portion of Sever Parcel 150, it is  
14 inconclusive how many acres Freeport has abandoned because a portion of Freeport's  
15 legal description for Sever Parcel 150 lies outside the named Decree acres.

16 Application 151 (*See* Attachs. 33, 35 & 36.)

17 Portions of Sever Parcels 1 and 2 lie outside the named Decree acreage. (*See*  
18 *infra*, § III(C)(1).) Sever Parcel 1 overlaps with the Sever Parcel for Application 162.  
19 (*See infra*, § III(D)(4).) In addition, because Application 151 seeks to transfer water  
20 rights from two Sever Parcels to two Transfer Parcels of corresponding size, Freeport  
21 should have submitted two separate applications. (*See id.*)

22 Most of Transfer Parcel 1 already has a Decree water right. (*See infra*, §  
23 III(C)(2).) Transfer Parcels 1 and 2 contain road and highway, and Freeport does not  
24 show that crops of value can be grown on this land. (*See id.*)

25 Application 162 (*See* Attachs. 38, 40 & 41.)

1 Most of the Sever Parcel lies outside the named Decree acreage. (*See infra*, §  
2 III(C)(1).) The Sever Parcel also overlaps with Sever Parcel 1 for Application 151. (*See*  
3 *infra*, § III(D)(4).)

4 A portion of Transfer Parcel 1 already has a Decree water right. (*See infra*, §  
5 III(C)(2).) Transfer Parcels 1 and 3 contain road, canal and ditch, and Freeport does not  
6 show that crops of value can be grown on this land. (*See id.*)

7 Application 166 (*See* Attachs. 43 & 45.)

8 All of the Sever Parcel lies outside the named Decree acreage. (*See infra*, §  
9 III(C)(1).) Freeport characterizes the Transfer Parcel as an intended habitat mitigation  
10 site, and the Decree water is therefore to be used for something other than the irrigation of  
11 crops of value as indicated on Freeport's Application. (*See infra*, § III(C)(2).) Freeport  
12 must file a change in use application that identifies the proposed purpose of water use as  
13 habitat mitigation, not irrigation.

14 **IT IS THEREFORE ORDERED** denying Freeport-McMoRan Corporation's  
15 Applications 2008-115, -118, -122, -133, -138, -147, -150, -151, -162 and -166.

16 **IT IS FURTHER ORDERED** granting the San Carlos Apache Tribe's Motion  
17 for Judgment as a Matter of Law (Doc. 110).

